

# INDONESIA AND LGBT: IS IT TIME TO APPRECIATE LOCAL VALUE?

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## Abstract

*This article addresses the issue on why Indonesian people cannot accept Lesbian, Gay, Bisexual, and Transgender ("LGBT"). Further, it also illustrates the reflection on how the society changes paradox in the era of globalisation. More concretely, which shows its willingness to uniform the social structure, at the same time attempts to preserve their own distinctive identity. Indonesian people who uphold Pancasila or five national ideologies would be a perfect example in this case. Pancasila, in this case, is a crystallization form of the values such as religious, social, and cultural realm which live within Indonesian society. As time passes, Pancasila is often grounded and contrasted to western cultural values like LGBT. The influx of LGBT thoughts which relies on the human rights concept spread a long time ago in Indonesia. However, this issue reemerges into the air, at the same time in different places and countries, becomes the vast spread of LGBT legalization such as in Europe and America. The resistance against Indonesian people, who mostly anti LGBT concept, is sparked by the influence of international human right law. These are recorded several times in Indonesia's history. Attempts such as submitting judicial review in the Constitutional Court about the offense of adultery contained in the criminal law case, establishing the pro-LGBT legal communities, and gathering social supports are also conducted to convince Indonesian people to accept LGBT in the society. However, both society and government agree to take steps and synergize to stand firmly to drown this effort. Then, this article will also expose some scholars' arguments, cases, jurisprudence, and journals to show the authors' standing in this context.*

**Keywords:** LGBT, Indonesia, Five National Ideologies, Human Right Law, Local Norms.

## 1. Introduction

This paper covers the grounds of majority Indonesian people who agree that LGBT is unacceptable behavior and prohibited choice for being applied in Indonesia. It is essential to remember that having contrast culture with western countries style which putting freedom expression on its first plate, Indonesia has its own style which influencing its direction to define what freedom of expression is. Approving Pancasila and The 1945 Constitution of the Republic of Indonesia ("1945 Constitution") as its the highest norm and law in Indonesia cause the state choose not to separate between the non-religious matters, including the state matters and the religious matters. In addition, the state shows its believing in God by putting this idea as the first norm in Pancasila, which is the basic value for the acts under the 1945 Constitution. Religion, social norms, and ethnic factors also add the cause of LGBT rejection among society which has been existed for a long time in this country. Alongside, the submissions in this paper are specifically based on some of related constitutional court verdicts, domestic laws, and some domestic cases.

Aiming to show another coin side which focussing on LGBT rejection issue in Indonesia is the main purpose of this writing. Discussing LGBT rejection in Indonesia never become a small snow for Indonesian. For some people, including the human right practitioners who defending LGBT actors, the outlook of Indonesia seems unfair and sounds as a

threat of intolerance and as a form of human right implementation crisis. These views spark due to the thought of distrust to the state for not being capable protecting LGBT actors as a minority group in Indonesia due to full rejection of its existence. Also, some of them expect that freedom of expression in western countries shall be considerably applied in eastern countries, including Indonesia. Therefore, this writing is essential to comprehend the international society that Indonesia has its own consideration for not legalizing LGBT implementation and showing its decision for not accepting LGBT actors and behavior in its territory without disregarding their right as human and recognizing their right as a citizen.

This paper serves as a complimentary article compares to previous articles that have been written by some previous authors about the issue of LGBT in Indonesia. Pros and cons are understandable in this case, however, this paper is not going to elaborate the pros and cons but focuses on the perspective of Indonesians in LGBT issues. International Human Rights Law are the specialized and related branch of science in this paper. Therefore, this writing will be elaborated the topic based on this areas but still focus on how and in which particular area Indonesians consider the human right law to be applied for express its human right.

Last but not least, the submissions in this paper uses paper-desk research for the research methodology. Further, collecting some data, such as articles, journals; opening some official institutional websites, and using some court verdicts, including some of the judges' dissenting opinion, are the main way for answering the

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questions in this paper. It is also going to involve some references from local laws, such as acts, Pancasila, and 1945 Constitution.

## 2. Indonesia and Pancasila

As consequence of placing Pancasila as *Staatsfundamentalnorm* in Indonesia<sup>1</sup> and as the state philosophy foundation, Pancasila holds the significant role in defining the outlook, direction, and identification of the state among international society members. Furthermore, as the highest norm in Indonesia, all the product of laws under Pancasila cannot against the value that being uphold by Pancasila. Consisting of five national ideologies concerned with local values and norms which upholding the values of religious, Indonesians put the value of believing in the one and only God as the first ideology in the order. Through the four judges' dissenting opinion for the case number 46/PUU-XIV/2016, Constitutional Court submits that the Founding Fathers of Indonesia do not comprehend the first ideology of Pancasila as theology and philosophies value only, but more interpret them as the principle or standard to live together in the society with multi-belief of religion and faith. Accordingly, this principle shall be interpreted as the standard for living among society, such as be fair to others and speak honesty as for avoiding the split among society. Based on these values, the state obtains its fundamental. Accordingly, the state stands firmly not to separate between the state matters and the religious matters. More concretely, under Pancasila perspective, the state strictly cannot allow any practicals in the daily life which keeping the distance away between the people and Pancasila values. Accordingly, protecting all the activities or daily routine practicals which decreasing the value of religious among the society under the name of freedom or basic right is unacceptable and violate the law.<sup>2</sup> This fact explains the reasons on why in every single Indonesia's court verdicts, it always mentions the term "In the Name of Justice Under The God Almighty" in the first order or in the local term, it is used to call as *irah-irah*, which means the head of the verdict. This consideration reflects that every legal certainty in Indonesia shall always be illuminated by religious value so that the existence of legal norms in Indonesia cannot be reduced and/or contradict the religious values.<sup>3</sup> This background also becomes one of the government consideration to state its citizen religious on the national identification card.

As for highlighting human rights meaning, the government of Republic Indonesia has its own interpretation, namely that the only way to view the application of human rights in Indonesia is that by

seeing them through Pancasila dan 1945 Constitution's perspective.<sup>4</sup> That background also bring a claim that this character is a differentiator this country compare to others.

### Indonesia: LGBT is human right?

In the recent years, recognition of LGBT as a part of human right – freedom of expression – has increased significantly and mostly happened in western countries. Taiwan and South Africa are only the two countries outside western countries group which recognize the existence of LGBT in its country respectively.<sup>5</sup> However, it can be seen that this movement is not significantly happened in eastern countries. The various causes can be the ground but religion is included as one reason behind this policy. The technology is a useful means in this globalization era, which helping the spread of LGBT thought faster than ever. At same day as many countries start recognizing the existence of LGBT people and right by legalizing same marriage or allowing adoption for same-sex couple, the other people in another countries who also support this movement are able to celebrate this victory instantly. Therefore, the same time as fast as the spreading news, the thought that LGBT as a part of human right which should to be recognized and protected by the state become wider and more powerful. However, it is always being forgotten that the idea that LGBT is a part of human right sparked around western culture countries cannot always be accepted easily in the countries which its culture and values contrast with the western countries. Since local cultures and values, histories, people, beliefs, and customs are sociology factors impacting the thought of the rejection or acceptance of any ideas in one particular area, the concept of LGBT as a part of the human right is not only uncommon but also different with their thought. Therefore, whilst some people agree with this idea, some groups of people take the initiative to prevent the influx of LGBT. The case of judicial review for Indonesia Penal Code to Constitutional Court can be an example of how some people disagree on the idea of LGBT. Briefly, the applicants submit that as the government of Republic Indonesia is not categorized as secularism country, then the state should protect its people from the danger of the LGBT influx. The applicants also use the family endurance and religious value protection as the ground of the submission. All of them agree that the potential threat caused by LGBT influence is able to be a threat for their family endurance. Although the Court rejected the application, the Court in its verdict mentioning that the Court agrees on the idea of renewal which submitted by the

<sup>1</sup> Maria Farida Indrati, Ilmu Perundang-undangan, Kanisius 2007, page 59

<sup>2</sup> Paragraph [3.34.5] the constitutional court verdict number 140/PUU-VII/2009, page 273-274

<sup>3</sup> Dissenting Opinion of four judges for the case number 46/PUU-XIV/2016, page 456

<sup>4</sup> Paragraph [3.34.10] constitutional verdict number 140/PUU-VII/2009, page 275

<sup>5</sup> [http://ilga.org/downloads/2017/ILGA\\_WorldMap\\_ENGLISH\\_Recognition\\_2017.pdf](http://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Recognition_2017.pdf) access 19/3/2018 at 4.21 pm

applicants. In other words, the Court agree that the importance of expanding the meaning of the article is necessary needed but those authority does not on the Court's hand<sup>6</sup>.

Four out of five judges submit their dissenting opinion which pointedly stating that:<sup>7</sup>

1. Under article 28J (2) 1945 Constitution, it affirms that 1945 Constitution is Godly Constitution. Therefore, the religious value and public order serve as the standard to be fulfilled in term of establishing the law. It means that the 1945 Constitution cannot permit the implementation of absolute freedom to everyone, especially to the actions which clearly against the religious value;
2. The paradigm and philosophy in those articles do not provide a place for religious values and living laws of society which being fully considered by the society. Furthermore, the ignominious nature which causes negative impact is not only considered as an individual issue but also as the communal problem due to the nature of human who is counted as a part of a group people;
3. Vigilante actions to perpetrators of sexual intercourse are occurred due to the disproportionate placing of religious values and living laws in the criminal law system in Indonesia.

Hence, based on those dissenting opinions it can be concluded that religious values and living laws have essential function and become guideline of living for Indonesians. It also can be highlighted that due to the individualism matter is not capable to apply in this system of society, then any kind of the ignominious nature which having a negative impact for the society automatically become communal matters. The framework of human right is not the same concept as the western countries, which does not connect between individualism matters and communal matters. Accordingly, the choice of life which risk the safety of religious values and living law will not affect the surroundings. This different concept in some particular occasion forgotten easily by the human rights activists who demand the right equality for LGBT people, especially to those who do not exactly understand the system of living in the eastern countries, such as Indonesia, because the different does not always have the same color.

LGBT is uncommon things to accept for most people in Indonesia. They consider LGBT is not as a part of the right, which guaranteed under 1945 Constitution, but more see it as ignominious nature, an act which against the God's will. The concept of man must marry the opposite sex and couple only be referred to marriage people grows stronger in the mindset of society instead of accepting the idea that everyone has same right to be with anyone – does not matter the gender. The LGBT action is more seen as inappropriate

behavior which clearly against the religious values and leads to a commit to sin action. It is essential to remember that in Indonesia, there is only six religion and a community of ancestral believe admitted by the government. The state's rejection to accept LGBT to live together with society does not come in one side but this decision taken after having a discussion with all the religious leaders. In this stage, all of the religious leaders agree that LGBT actions are against their respectively religious values and more consider LGBT actions as a sin instead of a right. Adultery case for Indonesians is a taboo thing and considered as an inappropriate behavior. The term adultery refers to the unmarried – man and woman – couple. Recently, the term adultery is also referred to the same-sex couple. An act can be considered as a good behavior as long it does not against the God's values, rules, and laws.<sup>8</sup> In this context, it is essential to understand that there is a strong connection between the society and the influx of religion values for defining the good and bad thing. For Indonesians, religion values contain many aspects, such as sociology, cultural, historical, and identity that is being a community belief. Religion values never being an individual experience but more being a social value and communal thing.<sup>9</sup> Therefore, it is safe to submit that in Indonesia, LGBT actions are not a part of the right and not suitable to apply due to the religious values and living laws upholding the society. In addition, this becomes a national submission for not accepting LGBT actions to ensure the fairness justice.

### **Restriction and Right to the freedom of expression**

Under article 28E point (2) 1945 Constitution, the state protects the right to the freedom to believe people's respectively faith and express their views and thoughts, in accordance with their conscience. Through this article, the state respect, recognize and protect the right to the freedom of its people to express their views and thoughts so that people in Indonesia have open access to speak for their thought/views. However, this article cannot be a guideline to speak in public for asking people to join to the community which it's standing against the government and potentially spark the unrest.

Also, attempting to use this article to interpret as a way or permission for expressing their thought in public freely without considering other people's right, living laws, and other social norms. The freedom is limited to some boundaries, such as other people right's, religious values, living laws, security, public order, or any kind of actions which containing reduction the values that the society believes. More concretely, the views which spread full of violence

<sup>6</sup> Point 7, page 452, Constitutional Court Verdict for case number 46/PUU-XIV/2016

<sup>7</sup> Page 457-467 Constitutional Court Verdict for case number 46/PUU-XIV/2016

<sup>8</sup> Page 454, Dissenting Opinion four judges in the case number 46/PUU-XIV/2016.

<sup>9</sup> Paragraph [3.34.22] the Constitutional Court Verdict for the case number 140/PUU-VII/2009, page 278

content and against the religious values and living laws are not allowed. The Penal code is a law product which regulates the penalty. Moreover, the Constitutional Court also agree that preventive aspect is always a priority consideration in a heterogenous society<sup>10</sup>.

Seeing from international society, this policy might be seen as a violation of the right of the freedom of expression. The limitation of express the idea or the views of themselves, the interference of government to define their identity, and the involvement society in private life matter are likely some factors to measure the standard of violence to the right of freedom to expression. However, it is safe to assume that the standard to define there is any violence caused in this case is that totally different. Human right in the western countries cannot be compared to human right in eastern countries, particularly in a country which believing in God and consider religion as a society value such as Indonesia. In addition, the term protecting the nation that written under the preamble of the 1945 Constitution which implicitly states that the general goals of society or general acceptance of the same philosophy of government shall be meant as providing full protection to cultural identity, ethnic, religion, and the characteristic of Indonesia as an individual and communal<sup>11</sup>. To protect the nation, the government should strive the society stability atmosphere, security, and public order. Those can be achieved by applying some restrictions for any actions which potentially sparks social unrest. In this stage, it also important to bear in mind that the restriction about the implementation of the human right is strictly enforced under law. Through its verdict for the case number 140/PUU-VII/2009, the Constitutional Court affirms that under article 1 point (3) 1945 Constitution, Indonesia declares and defines its form as the rule of law, which means that the determining factors in the implementation of state power are that supremacy of law and not the individual or specific group<sup>12</sup>.

Then, the next question followed is that can all of these considerations lead people to the conclusion that the government and the people in Indonesia violence the right for people who support LGBT people? The author submits that the state never ignore the right the LGBT people which protected by the 1945 Constitution. Right to education, to health, to work, and some of the right are allowed to this group of people. However, the state cannot risk its goals for the specific group of people business because the state has the

responsibility to protect all nation as referred under the 1945 constitution by upholding the values contained under Pancasila.

### 3. Conclusion

To sum up there is three points to conclude the writing, namely:

1. The implementation of human right in Indonesia, especially the freedom to expression – LGBT people and its actions – is not permitted due to the characteristic of Indonesia which upholding the religion values and living laws as consequence for placing Pancasila as *grundnorm*. Religion values cannot be seen as an individual experience but more to communal matters and the society, including the government, consider LGBT as a sin instead of a right;
2. Through this paper, the author expects that the international societies, including the LGBT activist, have a chance to see from another side of the coin about the cause of LGBT rejection in Indonesia. Although the spreading of pro LGBT community going wider, imposing another country to also support LGBT shall not to do. It does not mean that by rejecting LGBT actions in Indonesia, the government will not protect the LGBT people's right. The government recognizes its right as citizen and human, but the government strictly does not allow the support of LGBT continually exist in its territory. Another point, the author also expects that the international society, including the activist of LGBT, appreciate the local values that uphold by Indonesians. Through its values -- religious values and living laws – Indonesia becomes a solid country and respect its diversity thought as well as Malaysia, Brunei Darussalam, and Philipines;
3. It is safe to assume that this writing needs more constructive suggestion. Therefore, the author welcomes any constructive suggestions. This paper serves itself as a complimentary literature which concerned on LGBT in Indonesia. LGBT and Indonesia is an interesting topic to be concerned on because there are many aspects involved in this issue. Thus, the author suggests to the researcher to make research about this issue more comprehensive.

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<sup>10</sup> Paragraph [3.34.6] the Constitution Court verdict for the case number 140/PUU-VII/2009, page 274

<sup>11</sup> Paragraph [3.34.23] the Constitution Court verdict for the case number 140/PUU-VII/2009, page 278

<sup>12</sup> Paragraph [3.34.20] the Constitution Court verdict for the case number 140/PUU-VII/2009, page 278

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