



Conception of Sanctions for Same-Sex Marriage Couples in the Perspective of Balinese Customary Law (Comparison of Laws in the United States)

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Abstract

In Balinese customary law, same-sex sexual intercourse is known as “salah krama”, or sexual intercourse with wrong partners and it is strictly prohibited in Hindu law. The reason is the situation will make the offenders become cuntaka, leteh or impure. The purpose of this study is to analyse and reveal the paradigm of same-sex marriage from the perspective of international law and customary sanctions against same-sex marriage couples in Bali. The type of research used in this study is normative legal research. Based on analysis, the results of this study revealed that the United States government’s policy paradigm regarding same-sex marriage can be seen from the United States Supreme Court Decision which issued a policy that completely changed the existence of the LGBT community in the United States. Furthermore, the concept of customary sanctions against same-sex marriage couples in Bali is made in the form of giving customary sanctions to those practicing LGBT that must be executed strictly. The customary sanctions that can be given take the form of *arta danda*, *sangaskara danda*, and *jiwa danda*.

Keywords: balinese customary law; customary sanctions; same-sex marriage

INTRODUCTION

Depiction of God’s greatness is to create all creatures in the universe always in pairs. Men mate with women, so animals are created with their mates - males mate with females. Through the paired creatures, God shows how his greatness breeds offspring so that living creatures multiply and spread to all corners of the earth. According to nature, men pair up with women, but there are a group of people who behave in love with their same-sex partners and want to legalize this act to the level of marriage through the laws in force in their country. This is unacceptable for some people who are against same-sex loving behaviour which is commonly referred to as Lesbian, Gay, Bisexual and Transgender (hereinafter referred to as LGBT).

Legality of same-sex marriage in several countries, such as the Netherlands and recently legalized in the United States, should be the object of special attention for the Balinese people, considering that Bali has become a world tourism destination and is often visited by tourists from the United States. Even based on data from the Bali *BPS (Badan Pusat Statistik)*, visits of tourist from the United States to Bali in the December 2019 period reached 25,962 visits ([Badan Pusat Statistik Provinsi Bali, 2020](#)). This foreign tourist from

the US certainly has a diverse personality from one to another, including those who are same-sex enthusiasts.

Indonesia, especially in certain areas, generally strongly rejects the existence of LGBT. Therefore, when it comes to the basic rights of citizens, the LGBT community often encounters difficulties and experiences social clashes. Moreover, if we look at the customs in Indonesia and the people who hold fast to conservative religious doctrines, LGBT people and those who advocate the basic rights of the LGBT community are often seen as destroyers of religion and the cause of God's punishment. Therefore, not a few people hate, reject, fear, feel disgusted, even ostracize and stay away from LGBT groups.

Anti-LGBT group considers that legalizing something that is not in accordance with common sense and human instincts appears merely as an illusion made by humans and is a deviation from religion, while pro-LGBT group perceives that there is a restriction and suppression of their rights as citizens. Furores of LGBT behaviour in Bali arose when a same-sex marriage took place in the Ubud area, Gianyar-Bali. Case of gay marriage in Bali emerged in September 2015 when a same-sex marriage of men with different nationalities took place at a hotel in Ubud area, the Regency of Gianyar - Bali. The wedding was attended by a Pemangku (Hindu ceremony leader) and the parents of one of the bride and groom of the same sex. The local government and community leaders in Bali condemn all forms of same-sex marriage on the Island of the Gods. This is in response to the circulation of photos of the same-sex wedding event allegedly held in Ubud, East Bali.

Same-sex sexual intercourse is strictly prohibited in Hindu teachings, both religion and the customary law system in Bali. Customary law is law that is not written in regulations. Legislative Customary Law includes rules that exist even though they are not set by the authorities to be obeyed and supported by the people based on the belief that these regulations have legal force (Abdurrahman, 1984). In Balinese customary law, same-sex sexual intercourse is known as "salah krama", or sexual intercourse with wrong partners and it is strictly prohibited in Hindu law. The reason is the situation will make the offenders become cuntaka, leteh or impure.

According to Mansur's research, religions in Indonesia, including Islam, Catholicism and Protestantism, Hinduism, Buddhism and Confucianism both reject LGBT behaviour and same-sex marriage (Mansur, 2017). Viewing from the constitution, Indonesia places Pancasila as the grundnorm with the principle of Belief in One God as the foundation. Law Number 1 of 1974 concerning Marriage, in Article 1 stipulates that: "Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead." Based on the provisions of the law, marriage must be between a man and a woman (heterosexual) with the aim of forming a family (household).

Research about same-sex marriage has been examined previously. A result study conducted by Polymenopoulou (2018) that examined 'LGBTI Rights in Indonesia: A Human Rights Perspective' showed that the threat of criminal punishment of same-sex relationships has revived in Indonesia. Homophobia has been gradually observed throughout the country despite the remarkable improvements that were made in recent years, such as the drafting of the 'Principles on the application of international law in relation to issues of sexual orientation and gender identity' in Yogyakarta in 2007 and the organisation of the Jakarta Q-film festival. In addition, the result study conducted by (Fields & Wotipka, 2020) in their study that analyse the effect of LGBT anti-discrimination laws on school climate and outcomes for lesbian, gay, and bisexual high school students showed that even when not directly related to education, LGBT anti-discrimination policies matter for students. LGB students in states with more expansive LGBT rights face less harassment in school and earn higher grades than LGB students without those protections. Interventions that mitigate disparities faced by LGB students, such as supportive school staff and anti-bullying policies, should be put in place; state-wide anti-discrimination laws are a starting point to these interventions. The contradiction between the results of previous studies provides an opportunity for the current research to study further about same-sex marriage or LGBT. Therefore, the purpose of this study is to analyse and to reveal the paradigm of same-sex marriage from the perspective of international law and customary

sanctions against same-sex marriage couples in Bali.

METHOD

This research uses normative legal research. In normative legal research, law is conceptualized as what is written in legislation (law in books) or law is conceptualized as a rule or norm which is a benchmark for human behaviour that is deemed appropriate. In addition, this research uses a statute approach, a legal concept approach and a comparative law approach. The analysis was conducted to find out in detail the problems that exist in this study. The analysis was carried out by describing (illustrating) what the problem is, explaining the problem, examining the problem from related legal materials (evaluation) and providing arguments based on the results of the evaluation, so conclusions regarding the issues under the discussion in this study can be drawn.

DISCUSSION

The United States Government Policy Paradigm Regarding Same-Sex Marriage

The politics of marriage law in the United States is coloured by racial arenas, especially between blacks and whites. American marriage law reflects the politics of particular national interests, class, race, gender and sexuality in order to achieve equality. On the other hand, the state makes marriage a public policy of the state government to regulate it. Marriage contains two sides, rights and obligations. As an obligation, marriage must be subject to a form that has been determined by the state. As a right, marriage represents a free contract. Because of these two sides, the problem of marriage is always coloured by the political interests of various groups, both social groups who fight for their rights and the political interests of the state to regulate them (Yamin, 2012). Marriage related to the system of political liberalism in the United States is also formed by an unequal economic hierarchy, race, and gender. Marriage that includes two sides - the rights and obligations of citizens - is also in line with the democratic process and becomes the goal of struggle between various groups of people. With this marriage, political actors determine their interests and form their group identity (Yamin, 2012).

The issue of LGBT in the United States has been an issue that has been discussed by Americans for a long time. The beginning of this issue arose in the 17th century. In that century, LGBT was still considered a very taboo subject and prohibited to be discussed widely. Not only that, even homosexuality was still considered as offensive to the majority of American society thereat (Byard, 1997). It was caused by religious laws that were still thick among the people of the United States at that time. The existence of the LGBT community in the United States has been around for a long time. The response of the public in the area began to experience development. The case which was still considered very taboo at the beginning, now the people of the United States themselves have started to get used to the existence of the LGBT community around them.

Entering the 21st century, the LGBT community in the United States began to grow rapidly. As in 2000, Vermont became the first state to legally recognize lesbian and/or gay couples (Byard, 1997). The policy issued by the Vermont government is to give same-sex couples the same rights as heterosexual couples and there is no longer any difference between homosexual couples and heterosexual couples.

In 2004 Massachusetts made a policy that had a significant impact on the LGBT community in the United States. That year, Massachusetts passed a policy of legalizing same-sex marriage and it became the first state in the United States to legalize same-sex marriage (Bonauto & Wolfson, 2009). In fact, the Massachusetts Supreme Court held that barring gays and lesbians from marrying was a violation of Massachusetts law. The controversial policy issued by the Massachusetts state government was followed by other states. In 2008, the Supreme Court of the State of California held that same-sex couples have a constitutional right to marry. Therefore, in that year California became the second state in the United States to legalize same-sex marriage. Subsequent to Massachusetts and California, many states in America legalized same-sex marriage (Bonauto & Wolfson, 2009). Although earlier in the same year, California banned same-sex marriage in the state

(Juster, Vencill, & Johnson, 2017).

In 2013 the United States Supreme Court held that the interpretation of marriage was not just for heterosexual couples. On the other hand, same-sex couples also have the right to marry. This is explained in Chapter 3 of the 5th Amendment to DOMA (Defence of Marriage Acts) (McConnell, Janulis, Phillips, Truong, & Birkett, 2018). Until finally, on June 26, 2015, the United States Supreme Court issued a policy that completely changed the existence of the LGBT community in the state. The policy is the legalization of same-sex marriage on a national scale (BBC News, 2015). The policy, which was previously legalized in only 36 states, was eventually adopted nationally and all LGBT couples were allowed to marry into their community throughout the state.

The rules are contained in the Fourteenth Amendment to the United States Marriage Act. The Fourteenth Amendment requires states to legalize marriage between two people of the same sex and to recognize marriage between two people of the same sex when their marriage is legally licensed and performed outside the state (Putri, 2019). The Supreme Court in its decision stated that marriage is a fundamental right of every couple, and it cannot be excluded from same-sex couples. The crowd waiting for the verdict outside the courthouse welcomed the verdict, so the decision is considered a monumental decision in the history of this country (Putri, 2019).

Conception of Customary Sanctions Against Same-Sex Marriage Couples in Bali

Early on, the history of the pro and contra journey of LGBT in Indonesia can be discussed. In the past, Indonesia was one of the countries with a majority Muslim population that legalized gays and lesbians (Aziz, 2017). This is because apart from being recorded as having various ethnic groups and ethnicities, Indonesia also has a historical record as one of the countries that has been nurturing the first LGBT community in an Asian country. Indonesia has the Himpunan Wadam Jakarta which was established in 1960, Lambda Indonesia which was established in 1982, and the Persatuan Lesbian Indonesia which was established in 1987 (Deutsche Welle, 2016).

Indonesia is a country that recognizes Human Rights (called HAM) as something that exists and must be respected and protected. Chapter XA of the 1945 Constitution of the Unitary State of the Republic of Indonesia (referred to as the 1945 UUD NKRI) is a chapter that specifically regulates human rights in Indonesia in general. In addition, Indonesia also recognizes the 1948 Universal Declaration of Human Rights, which is an international human rights instrument recognized by the nations of the world (Yansyah & Rahayu, 2018).

LGBT is a social deviation that has a huge impact on society. It is very influential and destroys human nature and social order because human nature is not of that kind (Papilaya, 2016). Hence, from the aspect of religion, customs and laws, it is contrary to what is in Indonesia. The US and Indonesia are very different in terms of population and religion. Legality of same-sex marriage in America and Indonesia will result in different public acceptance. The country of Indonesia, which has an eastern culture, upholds religious norms, decency and morals as well as ethics, prohibits same-sex marriage. Same-sex marriage violates religious, moral and ethical norms of humans as creatures created in pairs and violates the basic law on marriage which will be legal if it is in accordance with the religious law of each party. Also, none of the religions recognized in Indonesia allow same-sex marriage, as well as religious values that are absorbed in society and become customs (culture). Indonesia recognizes indigenous peoples who are guided by their trusts and beliefs in customary law.

It is regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia as one of the constitutional foundations of indigenous peoples stating declarative recognition that the state shall recognize and respect the existence and rights of indigenous peoples. Customary law is traditional law which consists of rules made from the behavior of people who grow and develop so that it becomes a law that is obeyed unwritten.

One that is part of customary law is the existence of customary offenses. Customary offenses are unwritten rules or whole laws containing any things or actions that are classified as violations. There are several kinds of customary offenses as follows:

Customary offenses concerning decency;

Customary Offenses concerning Property;

Customary offenses regarding those that violate personal interests;

Customary offenses involving negligence or non-performance of obligations (Widnyana, 1993).

Violations of customary offenses will be subject to customary sanctions. Customary sanctions are an effort to restore the magical balance. In other words, the customary sanctions are an attempt to neutralize the shocks that occur as a result of customary violations.

Bali as an international tourist destination is visited by many foreign tourists from various countries around the world. Characters of tourists also vary, not to mention tourists who are paired as LGBT. The emergence of the prohibition against LGBT in Bali cannot be separated from Balinese customary law itself. Customary offenses regulating LGBT is the offense of "salah krama", that is to say having sex with creatures of the opposite sex. For example, sexual relations between humans and animals, or can be interpreted as non-paired (men – women) (Windia & Sudantra, 2006).

There are various kinds of customary sanctions in Bali. According to Suardana (2007), these customary sanctions are grouped into 3 groups, as follows:

Arta danda, namely the class of sanctions in the form of payment of money or replacement of goods, such as dedosan saha panicelnikel miwal panicel urunan;

Sangaskara danda, namely sanctions in the form of carrying out certain ceremonies to restore magical balance and carried out in accordance with Hindu religious teachings, such as the obligation to carry out the ceremonies of mecaru, pemisuda, prayascita and others;

Jiwa danda, namely the group of sanctions in the form of suffering to the body and or spiritual or soul such as mengaksama, mapilaku, lumaku, olas-olas, nyuaka or apologizing (Putra, 2010).

Customary sanctions are efforts made by a group of authorized people to bring things back in order by providing a deterrent effect on perpetrators of customary violations.

Those who practice LGBT activities in Bali have been exposed in the media several times. This certainly provoked public criticism, especially a number of Hindu religious leaders. LGBT existence was first discovered at the time a wedding ceremony of same-sex couple was held at one of the Hindu holy places in Ubud in 2020, and obviously it made the public angry. Traditional sanctions imposed on the perpetrators were arta danda and Sangaskara danda.

Provision of customary witnesses has not yet been able to provide a deterrent effect, so a concept of the imposition of customary sanctions is needed for LGBT actors, while still taking into consideration the human rights. The purpose of (criminal) sanctions according to the customary conception is to restore cosmic balance, the balance between the external world and the unseen world, to bring a sense of peace between fellow citizens or between members of the community or between members of the community and the community. In addition, punishment must be fair, in the sense that the punishment is perceived as fair both by the convicted person and by the victim and by the community, so the disturbance, imbalance or conflict will disappear (Widnyana, 1993). Thus, customary sanctions have a function and play a role as a stabilizer to restore the balance between the world of birth and the world of the unseen. In Bali, customary sanctions play a crucial role in restoring this balance. Therefore, the provision of customary sanctions to LGBT actors must be firm. This can be done by imposing customary sanctions in the form of Arta danda, Sangaskara danda, and Jiwa danda. Imposing these customary sanctions at the same time will be able to make LGBT actors think not to do leteh (filthy) things on the earth of Bali.

CONCLUSION

The United States government's policy paradigm regarding same-sex marriage can

be seen from the United States Supreme Court Decision which issued a policy that completely changed the existence of the LGBT community in the United States. The policy is the legalization of same-sex marriage on a national scale. The Supreme Court in its decision stated that marriage is a fundamental right of every couple and it cannot be excluded for same-sex couples. The conception of customary sanctions against same-sex marriage partners in Bali must be in the form of giving customary sanctions to LGBT offenders that must be firm. The sanctions imposed can be in the form of *arta danda*, *sangaskara danda*, and *jiwa danda*. Thus, customary sanctions have a function and play a role as a stabilizer to restore the balance between the world of birth and the world of the unseen. In Bali, customary sanctions play a crucial role in restoring this balance.

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