

## Same-Sex Marriage in the National Criminal Code

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### Abstract

**Introduction:** The complexity of the problems currently faced by society is related to the development of sexual behavior of same-sex intercourse. Reviewed from the health aspect, this act of intercourse has a higher risk of transmitting sexually transmitted diseases compared to general sexual behavior. In addition, this behavior is a sexual deviation that can also be used as means to commit a crime.

**Purposes of the Research:** This study aims to identify, analyze and formulate a criminal policy on same-sex intercourse in the National Criminal Code.

**Methods of the Research:** This research method uses a normative legal research type with a statute approach, a case approach and a conceptual approach. The legal analysis technique in this study was carried out kualitative.

**Results Main Findings of the Research:** This study shows that the Criminal Code still has weaknesses in the elements of criminalization of perpetrators of same-sex intercourse. The weakness is that the National Criminal Code only recognizes limited intercourse only between men and women, related to same-sex indecent acts that can be subject to criminalization if carried out under certain conditions. The solution needs to be formulated to expand the norms and create specific regulations (lex specialis) related to these acts. This is to maximize criminalization not only as a repressive means but also as a preventive measure against same-sex intercourse which is categorized as a criminal act.

**Keywords:** Same-Se Intercourse; Criminal Policy; National Criminal Code.

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## INTRODUCTION

Globalization in its development process has brought various positive and negative implications on the order of life of the world community. Developments in the fields of technology, communication and information, for example, have had a great influence, especially in making it easier for humans to be able to interact with each other without borders in countries around the world that are integrated from one country to another. This wide-open public discussion space then allows the exchange of information, especially related to the exchange of cultures, ideologies, and certain understandings, which previously only developed in certain regional areas to spread across the country's borders<sup>1</sup>.

This situation ultimately provides an opportunity for every human being to be able to learn from each other through the experiences of others from various parts of the world very easily just by using technology, communication and information based on digital media. This global interaction then plays a major role in efforts to accelerate the process of cultural unification, where cultural values from different parts of the world can be present and

<sup>1</sup> Rizky Febriansyah, "Dampak Kemajuan Teknologi Informasi Dan Komunikasi Terhadap Nilai- Nilai Budaya," *Venus: Jurnal Publikasi Rumpun Ilmu Teknik* Vol. 3 (2025): hlm. 3-5, <https://doi.org/10.61132/venus.v3i1.687>.

coexist with each other<sup>2</sup>. Cultural unity can not only bring a positive impact in the form of increasing cross-cultural understanding and tolerance, but can also encourage significant changes in aspects of public acceptance, for example to a new social phenomenon, changes in mindsets, shifts in moral values and social norms, as well as the development of social behavior patterns and social order that are increasingly modern and complex.

However, it is necessary to be concerned that the development of the increasingly modern and complex behavior pattern of Indonesian society can not only bring benefits to society, but can also give rise to new problems that can harm society itself. This is in line with the development process of Indonesian society which as a whole is currently undergoing modernization, which will tend to be followed by the development of more complex forms of crime. Criminality that may arise in a society that is undergoing a process of modernization also affects the development of new problems, especially those related to the quality and intensity of crime, the frequency of crime, changes in the elements of the act and the possibility of the emergence of new types of crime or criminal acts that were previously unknown in the legal system<sup>3</sup>.

In recent years, for example, Indonesian people have again been worried about the phenomenon of sexual behavior deviation or more familiarly known by the public as the LGBT+ phenomenon which is currently vocally daring to voice and show their existence (*coming out*) in the community<sup>4</sup>. The aspect of technology, communication and information, is basically one of the many means, tools or platforms used by this group to disseminate information about the existence of LGBT+ groups, where the purpose of this dissemination is so that this LGBT+ group can voice and fight for their rights, especially in terms of getting freedom of expression for their orientation and sexual identity without any intimidation or threats from society, and on the right to recognition in Indonesia<sup>5</sup>.

In some countries, the LGBT+ movement is even at the stage of demanding the legalization of same-sex marriage. On January 23, 2025, for example, Thailand officially became one of the first countries in the Southeast Asian region to then pass the Marriage Equality Law, where previously Thailand only recognized marriage between a man and a woman<sup>6</sup>. Through the law, Thailand amended clause 1448 of the Thai Civil Code which basically changes the term "husband and wife" to "living partner" in order to reflect the principle of equality in the Thai constitution<sup>7</sup>.

However, in contrast to Thailand, which has clearly positioned itself as a country that supports and legalizes all forms of homosexual behavior and actions, Indonesia has not been able to determine its attitude and/or position regarding efforts to respond to this LGBT+ phenomenon. Most of the Indonesian people are currently responding to the LGBT+ phenomenon with firm rejections shown by the many efforts of the Indonesian people to various efforts of LGBT+ groups in realizing the rights they propose as a sexual minority group. The rejection carried out by the community against sexual deviant behavior is mainly based on the existence of the rights of citizens collectively who are harmed by the existence

<sup>2</sup> Rini Fidiyani et al., *Antropologi Hukum: Dialektika Hukum Dan Kebudayaan Manusia* (Semarang: LPPM Universitas Negeri Semarang, 2022).

<sup>3</sup> Muladi and Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana* (Bandung: P.T. ALUMNI, 2010).

<sup>4</sup> Husnul Hasanah N Saleh, "Gambaran Kepercayaan Diri Pada Gay Dalam Proses Coming Out," *Indonesian Journal of Innovation Science and Knowledge* 11 1 (2024): 10-20.

<sup>5</sup> Gabriele Rinda Phoebe et al., "Eksistensi LGBT Dalam Media Sosial Di Dunia Digital" 3 (2024): 151-59.

<sup>6</sup> (Thailand Semakin Dekat Izinkan Pernikahan Sesama Jenis, 2023)

<sup>7</sup> Head Jonathan, Doksone Thanyarat, and Aemocha Panisa, "Thailand Mengesahkan Pernikahan LGBT- 'Perjuangan Panjang Yang Penuh Dengan Air Mata,'" BBC News Indonesia, 2025, [476 | Mutiara Gita Cahyani, Muhammad Azil Masku. "Same-Sex Marriage in the National Criminal Code"](https://www.bbc.com/indonesia/articles/c2eg38kv4jmo#:~:text=Thailand mengesahkan pernikahan LGBT -'Perjuangan,yang penuh dengan air mata'&text=Thailand adalah negara pertama di,Kamis (23%2F01).</a></p></div><div data-bbox=)

of sexual deviant behavior and acts of same-sex intercourse, which is very clearly very inversely proportional to what is held by the community based on moral, cultural and religious values which are also enshrined in Pancasila.

Based on one of the data obtained from the Ministry of Health (2016) and WHO (2017), the spread of HIV/ AIDS in Indonesia tends to be higher among groups of men who engage in sexual behavior in the form of sexual intercourse with other men or men who *have sex with men* (MSM), transvestites, sex workers, and drug or drug users. Two of them, MSM and transvestites, are part of the LGBT+ community and have a significant contribution to the spread of HIV/ AIDS due to risky sexual behavior. This is strengthened by UNAIDS data (2023). Considering the magnitude of the risk of transmission from same-sex sexual behavior, as well as the health impacts it causes, an in-depth study is needed related to existing legal regulations, including the possibility of criminalizing the practice of same-sex intercourse as a form of protection for public health and the nation's social order.

The criminalization of same-sex intercourse is a form of real action of resistance from the Indonesian people in responding to the development of LGBT+ behavior that is increasingly spreading in society. For example, in 2016 through decision No. 46/PUU-XIV/2016, a number of Indonesian people have made material testing efforts on a number of articles in the Criminal Code that are considered to have not provided legal protection and legal certainty related to adultery and same-sex sexual acts, which are also seen by the public as no longer able to reach the development of crimes in society. The urgency of criminalizing same-sex intercourse is also motivated by the health aspect where medically same-sex intercourse, especially *anal sex*, has a risk of transmission or transmission of sexually transmitted diseases, especially HIV/ AIDS, which is much higher than sexual intercourse in general, namely vaginal sex<sup>8</sup>. If same-sex sexual acts continue to be left without regulations that can limit sexual behavior or prohibit this deviant sexual act, then it is not impossible that it can be one of the main causative factors in terms of the increasing transmission of sexually transmitted diseases and HIV/ AIDS in the community. This is clearly contrary to what is the obligation of the state which should be able to guarantee its main right that every citizen has the right to realize a prosperous, good, and healthy life, which is also related to efforts to increase development, especially in an effort to improve the quality of human resources as mandated in the Constitution of the Republic of Indonesia in 1945<sup>9</sup> and Undang-Undang Nomor 17 tahun 2023 tentang Kesehatan<sup>10</sup>.

Based on the above background description, it is found that LGBT+ sexual deviant behavior, especially which is also accompanied by sexual behavior in the form of same-sex intercourse, can potentially cause other things that can have an impact on health and social aspects of society. Special restrictions and prohibitions on deviant sexual behavior are considered important in order to control and limit the freedom of everyone in terms of being able to act solely according to their will, especially for acts that can have an impact on society. Thus, the main purpose of this research is basically related to being able to identify the fulfillment of community legal certainty related to the urgent legal needs regarding the phenomenon of same-sex sexual behavior in society. This research is also expected to provide an overview related to the existing legal arrangements in regulating same-sex

<sup>8</sup> F S Putri and C K Herbawani, "Risky Sexual Behavior among Men Who Have Sex with Men (MSM) in Indonesia: A Literature Review," *Jurnal Kesehatan Pasak Bumi* 7, no. 1 (2024): 36–44.

<sup>9</sup> Indonesia, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," 1945.

<sup>10</sup> (Indonesia, 2023b)

sexual acts and provide legal recommendations so that it can be a recommendation in carrying out efforts to reconstruct national criminal law.

## METHODS OF THE RESEARCH

The research methods used in this study can be classified as a type of normative legal research. In the book *Normative and Empirical Law Research Methods*, written by Jonaedi Efendi and Jhonny Ibrahim, Normative Law Research can also be said to be doctrinal law research. In this research method, law is conceptualized as a provision written in laws and regulations (*law in book*) or law that is conceptualized as a rule or norm that is a benchmark for people's behavior towards everything that is considered appropriate (*law in action*). The approaches used in this study are the *statute approach*, the *case approach* and the *conceptual approach*<sup>11</sup>. In addition, the legal materials in this study were obtained from three types. First, primary legal materials (*basic data*) in the form of laws and regulations and jurisprudence. Second, secondary legal materials in the form of books/literature, scientific works by scholars, personal data and those obtained from certain agencies related to the topic of same-sex intercourse. Tertiary legal materials are materials that can provide information or instructions related to primary and secondary legal materials such as bibliographies, dictionaries, and cumulative indexes<sup>12</sup>. The collection of legal materials is carried out by literature study and analysis of legal materials is carried out with qualitative techniques, namely research that is intended to understand the phenomenon of what is experienced by the research subject such as behavior, perception, motivation, action, holistically, and by way of description, namely in the form of words and language, in a special natural context and by utilizing various natural methods<sup>13</sup>.

## RESULTS AND DISCUSSION

Perhaps it is necessary to understand first some terminology related to same-sex intercourse and LGBT+ (*lesbian, gay, bisexual, transgender*) groups. In *the Cambridge Dictionary*, the term LGBT+ is interpreted as part of a sexual orientation that is not heterosexual<sup>14</sup>. Sexual orientation is basically divided into 3 (three) categories. First, heterosexuality is sexual attraction to someone (partner) of a different gender. Second, homosexuality is sexual attraction to someone (partner) who is of the same sex, in this case the term sexual orientation consists of *Lesbian* (women who like/are sexually oriented towards women) and *Gay* (men who like/are sexually oriented towards men). Third, *bisexuality*, which is sexual attraction to both sexes, both female and male, in this case the term sexual orientation is bisexual<sup>15</sup>. In addition, there is also the term transgender or transsexual which can be interpreted as a person who identifies his gender identity/gender identity as different from the sex assigned at birth. There are not a few transgender individuals who do not only identify their gender identity, but also carry out acts of changing their gender (transsexual) through medical procedures, mainly in order to be able to commit sexual acts<sup>16</sup>.

<sup>11</sup> Efendi Jonaedi and Ibrahim Jhonny, *Metode Penelitian Hukum Normatif Dan Empiris*, Pertama (Jakarta: KENCANA, 2016).

<sup>12</sup> Soemitro Ronny Hanitijo, *Metodologi Penelitian Hukum Dan Jurimetri*, Cet.4 (Jakarta: Ghalia Indonesia, 1990).

<sup>13</sup> Moleong Levy J, *Metodologi Penelitian Kualitatif* (Bandung: PT Remaja Rosdakarya, 2008).

<sup>14</sup> "Definition of LGBT," Cambridge University Press, accessed June 13, 2025, <https://dictionary.cambridge.org/dictionary/english/lgbtq>.

<sup>15</sup> "Understanding Sexual Orientation and Homosexuality," American Psychological Association, 2008, <https://www.apa.org/topics/lgbtq/orientation>.

<sup>16</sup> Devi Eka Johana, Fattah Hanurawan, and Indah Yasminum Suhanti, "Persepsi Sosial Pria Transgender Terhadap Pekerja Seks Komersial," *Jurnal Sains Psikologi* 6 (2017): 16-21.

On the other hand, in fact, until now data on the prevalence of people who have a sexual orientation who are not heterosexual in Indonesia has not been known for sure. The difficulty in collecting data on LGBT+ groups is mainly due to the high negative stigma of the Indonesian people towards this group. But on the other hand, in the current era of global development and modernization, many individuals have explicitly begun to identify themselves as LGBT+, this is also proven in a study conducted in 2020 by Anan Bahrul, of the 7 (seven) people who have been asked for information, 6 (six) of them identify as *gay* and 1 (one) other person identifies as *bisexual*<sup>17</sup>. Another study conducted in 2021 by Kasmaya, involved 4 (four) participants, all of whom identified themselves as *lesbians*<sup>18</sup>.

Regarding the factors that cause the development of sexual orientation, until 2025 there is no international or domestic-based scientific consensus, or academic scientific studies that can confirm that LGBT+ sexual orientation arises due to genetic factors<sup>19</sup>. However, most studies that have researched related to the factors that cause LGBT+ sexual orientation, will generally say that the dominant factor causing this deviation in sexual orientation is due to external sociological factors such as the occurrence of family dysfunction (parenting/trauma), environment (socializing), lack of moral and religious values, the influence of spectacle (outside culture), and other factors, which are still possible to be corrected and cured<sup>20</sup>. So the narrative that states that LGBT+ sexual orientation is an outward thing so that it cannot be changed and should be accepted by society as part of the new social norm, is a wrong view and still does not have a basis that can support it.

As for the development of sexual orientation which is no longer limited to heterosexuals, it will also affect the development of sexual behavior patterns that also change. Sexual behavior itself is a sexual activity which is one of the many forms of sexual behavior, including sexual acts which will certainly be related to the gender or sex of their partner. At least currently there are 4 (four) forms of sexual behavior that occur, namely *men sex women* (MSW), *women sex men* (WSM), *men sex men* (MSM), *women sex women* (WSW) <sup>21</sup>. LGBT+ in Indonesia, this sexual behavior then becomes one of the new problems that can invite conflict and can disturb the balance and order in society. The sexual behavior in question is the sexual behavior of *men and women* (MSM), *women sex women* (WSW) and transgender people who are members of the LGBT+ sexual minority group.

It is necessary to admit that most LGBT+ sexual minority groups in Indonesia still often receive various acts of discrimination and persecution from the community. This act of rejection in a society that seems intolerant is mainly based on people's fears, especially on the occurrence of changes in the social order and moral values in the community which are feared to affect their families. In addition, the community also considers that the sexual behavior has injured the moral values of the community and the rights of the community related to being protected from threats and/or fear of an attempt to do or not to do an act, the right to be able to live a healthy life both physically, mentally, socially, the right to a healthy environment and the right to get protection from health risks.

<sup>17</sup> Anan Bahrul Khoir, "LGBT, Muslim, and Heterosexism: The Experiences of Muslim Gay in Indonesia," *Wawasan: Jurnal Ilmiah Agama Dan Sosial Budaya* 5, no. 1 (2020): 1-19, <https://doi.org/10.15575/jw.v5i1.8067>.

<sup>18</sup> Kasmaya, "Keberadaan Lesbian Di Kota Syariat: Faktor Dan Interaksi Subjek," *Jurnal Sosiologi Agama Indonesia (JSAI)* 2, no. 2 (2021): 86-100, <https://doi.org/10.22373/jsai.v2i2.1473>.

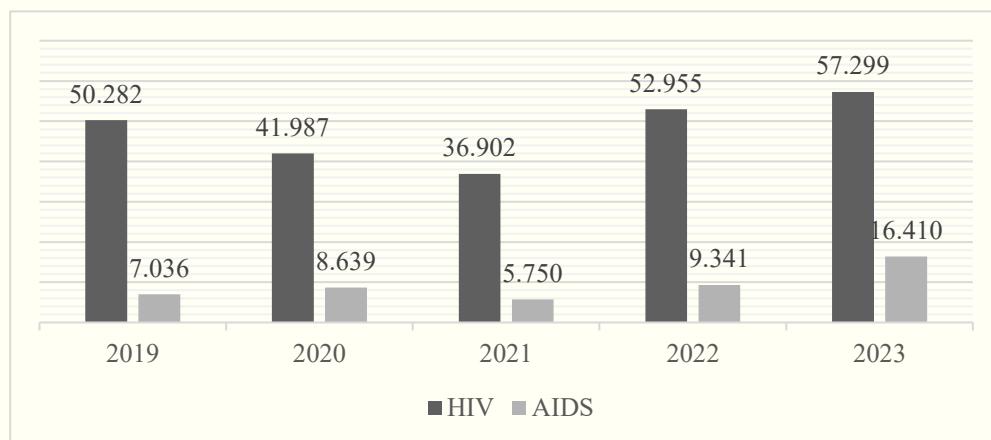
<sup>19</sup> Gozan Misri, "Perilaku Homoseksual: Mencari Akar Pada Faktor Genetik," *NIZHAM: Jurnal Studi Keislaman* Vol.4 No.1 (2016).

<sup>20</sup> Eriyanti Novita, "Identifikasi Pembentukan Identitas Orientasi Seksual Pada Homoseksual (Gay) Setiap Manusia Diciptakan Oleh Allah" 2, no. 2 (2021): 194-205, <https://doi.org/10.51849/j-p3k.v2i2.99>.

<sup>21</sup> I Gusti Ayu Agung Elis Indira, Anak Agung Indah Jayanthi, and Putu Yunita Primasari, "Pelayanan Kesehatan Terkait Infeksi Menular Seksual Pada Lesbian, Gay, Biseksual, Dan Transgender," *Intisari Sains Medis* 13, no. 3 (2022): 375-346, <https://doi.org/10.15562/ism.v13i3.1533>.

The intended health risks are related to the spread of diseases that can be transmitted due to heterosexual, homosexual and bisexual sexual behavior. Diseases transmitted through sexual behavior can be said to be sexually transmitted diseases (STDs) which at least consist of *chlamydia*, *genital herpes*, *gonorrhea*, *Human papilloma virus (HPV)*, *syphilis*, HIV/AIDS to *Mpox* which is transmitted through sexual activity<sup>22</sup>. Based on research conducted in 2016 by the Ministry of Health, it is explained that in Indonesia, the potential for transmission of sexually transmitted diseases and HIV/AIDS will often be found in key population groups, namely a group of people whose behavior has a high risk of contracting and attempted transmission. This key population group consists of men, transvestites, commercial sex workers and *people with injected drugs*<sup>23</sup>. From this fact, it is known that two of the four key groups declared by the Ministry of Health are part of the LGBT+ sexual minority group, including *men who have sex with men* (MSM) which means men who engage in sexual behavior in this case are acts of intercourse with men and transvestites because often transvestites engage in risky sexual behavior, especially by becoming commercial sex workers (PSK) transvestites, so that risky sexual behavior carried out by this group of transvestites can be one of the factors in the spread of HIV/AIDS and STIs<sup>24</sup>. This was also emphasized in a study conducted by UNAIDS which also conducted research related to HIV prevalence in Indonesia by comparing HIV/AIDS prevalence in non-Papuan and Papua regions. The results of the study show that in non-Papuan Indonesia, the prevalence of key population groups most at risk of being infected with HIV/AIDS are male sex workers (25.27%), *men sex with men* (21.90%), *people who inject drugs* (14.70%), *transgender women* (12.70%), and female sex workers (2.20%)<sup>25</sup>.

**Graph 1. Number of Positive HIV and AIDS Cases in 2019-2023 in Indonesia**



Source: Indonesia Health Profile, 2023

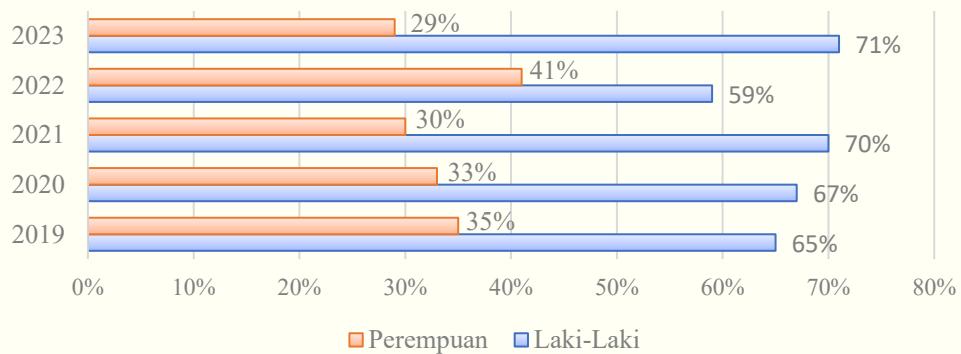
<sup>22</sup> "About Sexually Transmitted Infections," CDC, 2024, <https://www.cdc.gov/sti/about/index.html>.

<sup>23</sup> WHO, "HIV Epidemiology Review, Indonesia 2016," Directorate General of Disease Prevention and Control, 2017, 1-66, [https://siha.kemkes.go.id/portal/files\\_upload/HIV\\_EPIDEMIOLOGY REVIEW\\_INDONESIA\\_2016.pdf](https://siha.kemkes.go.id/portal/files_upload/HIV_EPIDEMIOLOGY REVIEW_INDONESIA_2016.pdf).

<sup>24</sup> Syiddatul Budury, "Analisis Faktor Yang Berhubungan Dengan Kepatuhan PSK Waria Dalam Mencegah Penularan HIV/AIDS Di Surabaya," 2019, <https://doi.org/https://doi.org/10.31219/osf.io/j67wn>.

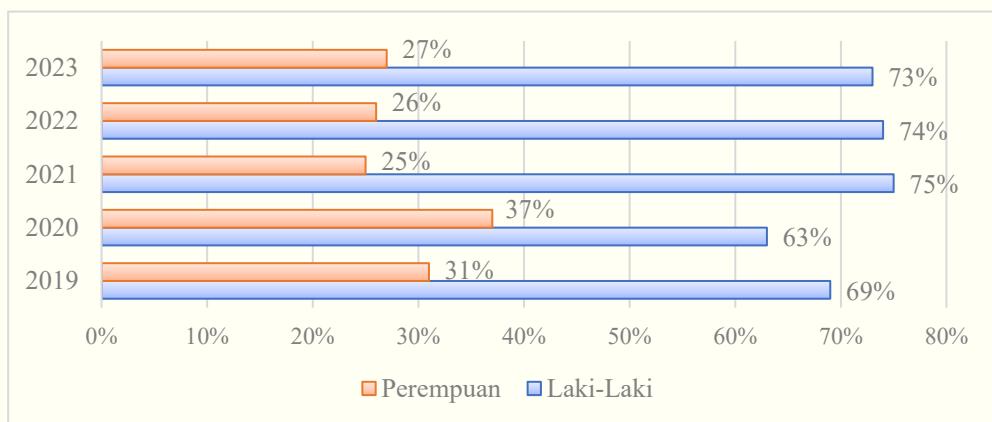
<sup>25</sup> UNAIDS, "An Evaluation of the Contribution of the UNAIDS Joint Programme to Strengthening HIV and Primarily Health Care Outcomes: Country Case Studies Indonesia," 2023.

**Graph 2. Number of HIV-Positive Cases by Gender in 2019-2023**



Source: Indonesian Health Profile, 2019-2023

**Graph 3. Number of Positive AIDS Cases by Gender in 2019-2023**



Source: Indonesian Health Profile, 2019-2023

Based on data obtained from the Ministry of Health related to the number of HIV/AIDS cases in Indonesia, it shows that the spread of HIV/AIDS in Indonesia every year has fluctuated and there has been an increase in HIV/AIDS cases in 2023. In addition, according to the data, the distribution of HIV/AIDS cases by gender in graph 2 and graph 3 shows that the male group has an important indicator in terms of the group that is at high risk of transmission or contracting HIV/AIDS. Although until now the government has made various efforts to prevent and handle HIV/AIDS, this is still a big challenge and reality that needs to be faced. For this reason, taking into account the data mentioned above, it is necessary to study more deeply related to how the mechanism of transmission or infection of HIV/AIDS in this group of male population.

Referring to research conducted in 2021 by Herda, it was found that there is a correlation between the spread of HIV/AIDS in men and risky sexual behaviors, in this case men of the sex with men (LSD). Through this research, there are at least several reasons or factors that cause HIV/AIDS to be found in men. First, there is a contribution to the sexual behavior of men and men who have intercourse through anal or anal sex. Second, there is a contribution to the sexual behavior of men and men who have unprotected or unsafe oral sexual intercourse. Third, having sexual intercourse or intercourse with more than one person who often changes partners. Third, having sexual intercourse with a person identified as having

a sexually transmitted infection. Fourth, having sexual intercourse through commercial sex. And finally, the use of drugs or drugs<sup>26</sup>.

This HIV/AIDS disease has basically had a real negative impact that can harm society. This is because until now there are no vaccines and drugs that can prevent as well as vaccines and drugs that can cure HIV/AIDS. In addition, HIV/AIDS also has an asymptomatic phase or asymptomatic infection, making it difficult to detect immediately. For this reason, prevention of the spread of HIV/AIDS cannot be considered a small problem that can be ignored because it can also have an impact on efforts to develop national health and the fulfillment of people's rights to health, which is certainly risky to the economic aspect of the community itself<sup>27</sup>.

In an effort to solve problems caused by same-sex intercourse as mentioned above, I think efforts to prohibit same-sex intercourse through criminalization can be a much more effective solution, when compared to using only other laws and regulations outside the criminal law. In Indonesia itself, the criminal law rules that explicitly regulate the prohibition of same-sex intercourse, especially in the context of both requiring same-sex intercourse (there is no element of forced effort from one of the parties) carried out by adults, are considered not to be clearly and firmly regulated.

Indonesian Criminal Code (WvS)<sup>28</sup>, Most of the articles that regulate related to acts of same-sex sexual immorality only regulate the criminalization of obscene acts of same-sex intercourse in which in the formulation of the article there is an element of coercion or connects obscene acts with certain conditions. Regarding same-sex obscene acts, the regulation of same-sex obscene acts in the Criminal Code (WvS) is regulated in Article 292 of the Criminal Code (WvS), that "*a person of legal age, who commits an obscene act with another person of the same sex, who is known or should be suspected, that he is not of age, is threatened with imprisonment for a maximum of five years*". Based on the provisions of the *a quo article*, it can be understood that criminal efforts for obscene acts can only be carried out, if the victims of the obscene acts are limited to people who should be suspected of not being of age. The background of the age restriction in the formulation of the article *a quo* is because the Netherlands does not consider LGBT+ sexual behavior and same-sex marriage as a criminal offense (as long as it does not target minors)<sup>29</sup>. Therefore, article *a quo* may still have some weaknesses of criminal elements in the formulation of the article, namely: a) The provisions of obscene acts in this article are only limited to the focus of age; b) The intolerance of obscene acts, especially in the context of same-sex acts committed between adults; c) That the formulation of article *a quo* has not specifically regulated the realm of gender or gender identity. So based on these three problems, in the end, it can lead to multiple interpretations substantively. In addition, related to its implementation, often the majority of law enforcement officials still interpret this obscene act only limited to molestation between men and women, but not with molestation committed with the same sex. Therefore, it is necessary to expand the formulation of the article by paying attention to the 3 (three) points.

In addition to being based on a *quo article*, criminal law regulations related to sexuality can also be seen in Article 284 of the Criminal Code (WvS) which basically regulates acts of

<sup>26</sup> Gina Noor Djalilah and Roni Subagyo, "Hubungan Perilaku Seksual Berisiko Dengan Kejadian HIV / AIDS Pada Laki Seks Laki" 2, no. 1 (2021).

<sup>27</sup> Heti Susiyanti Pasaribu and Muhammad Ali Sodik, "Perilaku Seksual Berisiko: Pengaruh Perilaku Seksual Berisiko Terhadap Kejadian HIV / AIDS," *Obstetrics and Gynecology* 110, no. 6 (2018): 1473-78, <https://doi.org/10.1097/01.AOG.0000291572.09193.7f>.

<sup>28</sup> Indonesia, "Undang-Undang Nomor 1 Tahun 1946 Tentang Peraturan Hukum Pidana," 1946.

<sup>29</sup> Chalid Hamid and Yaqin Arief Ainul, "Perdebatan Dan Fenomena Global Legalisasi Pernikahan Sesama Jenis : Studi Kasus Amerika Serikat , Singapura , Dan Indonesia," *Jurnal Konstitusi* 18 (2021): 155, <https://doi.org/https://doi.org/10.31078/jk1817>.

adultery. Article *a quo* is often considered to still have a legal vacuum and is considered unable to reach the development of crimes that are currently occurring. The act of adultery that can be committed by criminal efforts according to this article is only limited to conditions where the perpetrator (male or female) is already bound by marriage, then has sexual intercourse with another man or woman who is not his husband or wife. The community itself is of the view that the regulation can no longer provide legal certainty for the community. If you look at the reality that is happening today, and it is also supported by arguments from the existing aspects of moral values and religiosity. The community also considers that adultery is no longer limited to the conditions as described in the formulation of the article, but actions such as free sex, cohabitation, same-sex intercourse should also be accommodated in the formulation of the adultery article. Because of this, it is necessary to change the formulation of the article by adding the main element of adultery related to the element of same-sex intercourse and eliminating the restriction of sex on the element of adultery in the formulation of the article. Thus, the needs of the community related to the existence of legal certainty that can protect them from the threat of such actions can be met.

That the two articles were in 2016<sup>30</sup> There have been attempts to submit a material test with case registration Number 46/PUU-XIV/2016. The articles tested in the case are Article 284 paragraphs (1) to paragraph (5), Article 285 and Article 292 of the Criminal Code (WvS). The petitioners consider it necessary to make changes and expand the formulation of these articles. The petitioners also argue that the articles are considered to be incapable of reaching the crimes that are currently occurring, in this case the cases of crimes intended by the petitioners include intercourse committed outside of marriage (not in a marriage bond) or promiscuous sex, and obscene acts or same-sex intercourse committed by adults with other adults. The petitioners considered that the immoral conduct had caused real harm and that there was no longer a sense of security from the crimes. In addition, the inaccessibility of these cases by the law and the inability to take action by law enforcement have illustrated the existence of a legal vacuum, which if left unchecked, can cause moral damage which also has an impact on the destruction of social order and the threat to the safety of the applicants' families. However, through its ruling, the Constitutional Court rejected the application submitted by the applicants. The rejection was because the Constitutional Court considered that the application submitted by the applicants was more of an application to change the formulation of the law, which was not the authority of the Constitutional Court. Due to the inability of article *a quo* to accommodate the sexual behavior of same-sex intercourse as part of the criminal element, as well as the lack of authority of the Constitutional Court to amend and expand the formulation of article *a quo*, this is a tangible form of the existence of the continuity of the legal void mainly related to acts of free sex, cohabitation, and same-sex intercourse.

However, in 2022-2023 Indonesia has ratified Law Number 1 of 2023 concerning the Criminal Code, which will hereinafter be referred to as the National Criminal Code<sup>31</sup>. Changes in the National Criminal Code that carry out a total reconstruction have become a separate hope for the realization of changes in the formulation of articles that have not accommodated criminal acts that were previously not considered as a crime to become criminal acts. The effort to criminalize an act into a crime can basically be seen through criminal policy which is manifested in the elements of criminal acts in its formulation.

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<sup>30</sup> Mahkamah Konstitusi, "Putusan Nomor 46/PUU-XIV/2016," 2016.

<sup>31</sup> Indonesia, "Law Number 1 of 2023 concerning the Criminal Code," 2023.

Criminal policy itself can be interpreted as "crime prevention policy with criminal law" or in short, criminal law is used as a means of crime control. The main purpose of criminal policy is to protect the community and to achieve the welfare of the community<sup>32</sup>. If efforts to overcome a crime will use criminal law means, then what can be done is to prohibit an act, then regulate what sanctions will be imposed and what criminal sanctions will be applied to existing criminal acts<sup>33</sup>.

Reform of the National Criminal Code<sup>34</sup>, There are several criminal policies that have expanded the elements of criminal acts in the formulation of the article, and there are also articles that criminalize an act, including acts related to sexuality. Some of them are adultery regulated in Article 411 of the National Criminal Code, acts of sexual intercourse with family members regulated in Article 413 of the National Criminal Code, acts of molestation regulated in Articles 414 to 422 of the National Criminal Code, acts of rape regulated in Article 473 of the National Criminal Code, acts of cohabitation regulated in Article 412 of the National Criminal Code, to the criminalization of people who have sexual relations with animals as regulated in Article 337 of the National Criminal Code. However, with regard to the main topic is the act of same-sex intercourse, I hope the analysis of the elements of criminal acts will be focused on articles related to same-sex intercourse.

After the ratification of the National Criminal Code, this then raises the question of whether the reconstruction of the formulation of articles in the National Criminal Code, especially regarding same-sex intercourse, has been made to expand the elements of criminal acts or criminalization efforts have been made as requested by the public in the Constitutional Court's decision in the previous discussion. Then, how is the description of the criminal element in the article that regulates the act of adultery and obscene acts. Whether the criminalization of acts of same-sex intercourse, especially those in the context that is carried out because of mutual consent, can be accommodated in these two articles or is there still a legal vacuum in the formulation of the article related to acts of same-sex intercourse?

The first article that needs to be understood first is Article 411 of the National Criminal Code regarding the crime of adultery. The regulation of this act of adultery may have several changes in the formulation and efforts to criminalize the act. The main content of this article itself is "*every person who has sexual intercourse with a person who is not his husband or wife, shall be punished for adultery...*". More specifically, it is explained in the explanation of what is meant by "a person who is not a husband or wife" in Article *a quo* as follows: a) "A man who is in a marriage bond has sexual intercourse with a woman who is not his wife; b) A woman who is in a marital bond has sexual intercourse with a man who is not her husband; c) A man who is not in a marital bond has sexual intercourse with a woman, even though it is known that the woman is in a marital bond; d) A woman who is not in a marriage bond has sexual intercourse with a man, even though it is known that the man is in a marital bond; e) A man and a woman who are not bound by marriage each have sexual intercourse".

So based on the formulation of the article, there are 2 (two) important changes in the formulation of the article that need to be considered. First, the concept of adultery is no longer limited to one of them must be bound by marriage. Second, the act of sexual intercourse between a man and a woman, both of whom are not legally bound (free sex) can

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<sup>32</sup> Sunarso Siswanto, *Filsafat Hukum Pidana Konsep, Dimensi, Dan Aplikasi* (Jakarta: Rajawali Pers, 2015).

<sup>33</sup> Ali Mahrus, *Dasar-Dasar Hukum Pidana* (Jakarta: Sinar Grafika, 2017).

<sup>34</sup> (Indonesia, 2023)

be criminalized. However, in the *a quo* article, there are still legal weaknesses related to criminal law that only recognize acts of sexual intercourse limited to acts of sexual intercourse between men and women. Because of this, the *a quo* article is considered not to accommodate the criminalization of same-sex sexual intercourse that occurs in society. Thus, the needs of the community related to the existence of legal certainty that can protect them from the threat of same-sex intercourse are still not met.

Furthermore, the article that has a correlation with acts of same-sex intercourse is Article 414 of the National Criminal Code. The formulation in Article 414 of the National Criminal Code is basically a combination of Article 289 and Article 292 of the Criminal Code (WvS). As for the analysis that has been carried out on Article 292 of the Criminal Code (WvS), which basically still has a legal vacuum related to criminal efforts against same-sex obscene acts committed by adults to adults, it raises the question of whether these shortcomings have been accommodated through Article 414 of the National Criminal Code. The rules stipulated in Article 414 paragraph (1) of the National Criminal Code basically stipulate as follows "*every person who commits an obscene act against another person of a different or the same sex: (a) in public; (b) forcibly or threatened with violence; (c) published as pornographic content, shall be punished*". In addition, Article 414 paragraph (2) of the National Criminal Code regulates "*every person with violence or threat of violence forcing another person to commit an obscene act against himself shall be punished*". That based on the two *a quo* articles, there were several changes in the criminal element in the formulation of the *a quo* article. First, there is an expansion of criminal elements related to victims of obscene acts which are no longer limited to victims who are not yet old but can also accommodate adult victims. Second, there is an expansion of the gender element. Third, the imposition of criminal sanctions is regulated differently according to the criminal elements<sup>35</sup>. Although both Articles *a quo* have accommodated 3 (three) points of weakness in Article 292 of the Criminal Code (WvS). However, in an effort to criminalize same-sex obscene acts committed between adults, it is possible that these acts still cannot be imposed using Article 414 of the National Criminal Code. This is because there are special conditions or special specifications for same-sex obscene acts between adults that can be subject to criminalization, which is limited to obscene acts that must be carried out at least among 3 (three) conditions, namely in public, there is a forced effort with violence and threats, or being published. Thus, the existence of same-sex sexual intercourse between adults (mutual intercourse) carried out in private spaces is still not accommodated in the *a quo* article.

That in criminal law there is one very fundamental principle, this principle is stated in Article 1 paragraph (1) of the National Criminal Code which states "*no single act can be criminalized and/or acted, except on the strength of criminal regulations in the laws and regulations that existed before the act was committed*". The principle intended in the formulation of a *quo article* is the principle of legality which has the main function in order to realize the protection of individuals from arbitrary law enforcement efforts, and ensure the achievement of legal certainty<sup>36</sup>. There are 4 (four) basic principles of legality that are addressed to the legislature and judges to be a guideline, namely for lawmakers the criminal provisions must not apply retroactively "*lege previa*" and the formulation of criminal acts must be clear "*lege certa*", then for judges it is not allowed to state that someone commits a

<sup>35</sup> Nadya Lailatul Rahmi et al., "Analysis of the Regulation of Criminal Acts of Obscenity in Law Number 1 of 1946 and Law Number 1 of 2023 concerning the Criminal Code" 8, no. 4 (2024): 728–41.

<sup>36</sup> Fikriya Aniqa Fitri, Nisaul Muftia, and Irdha Trilia, "A Theoretical Review of the Principle of Legality in Indonesian Criminal Law" 1, no. 2 (2024): 202–9.

criminal act if it is not based on the written law "*lege scripta*" and no analogy is allowed in the criminal law "*lege stricta*"<sup>37</sup>.

Based on the concept of legality which is then associated with the results of the discussion of the formulation of articles of the National Criminal Code related to same-sex intercourse, in the context if the act of same-sex intercourse (mutual will) is carried out in a private space, then the act cannot be subject to criminalization. As for the basis on which people who commit acts of same-sex intercourse (mutual endangerment) committed in private space, because there are 2 (two) main weaknesses in the formulation of criminal elements in the Criminal Code related to the criminalization of same-sex intercourse, namely: a) Criminal law only recognizes the concept of intercourse between men and women; b) The act of same-sex intercourse between adults (mutual affection) cannot be subject to criminal punishment if the act is not carried out under the conditions stipulated in Article 414 paragraph (1) of the National Criminal Code.

Basically, the purpose of the idea of criminalization proposed by conservative society related to LGBT+ is to be able to limit the freedom of LGBT+ groups not to commit acts solely seeking satisfaction according to their will, especially if the acts or behaviors carried out by LGBT+ groups can not only have an impact on them, but also have an impact on society at large. In a 2019 study, stating that gay is not innate from birth (genetic), a person can become gay due to the existence of insight (external) factors that can be consciously learned<sup>38</sup>. The argument is also supported by the fact that there is no scientific consensus that can justify the practice of same-sex intercourse. Thus, with the absence of such a justification and supported by the real impact that occurs, especially from the health aspect, the government should be able to take a firm stance in dealing with the problem of same-sex intercourse.

The pros and cons of criminalizing LGBT+ sexual behavior continue to cause opposition from the parties. In this case, those who support the need for criminalization are based on the need for criminalization, namely to respond to the problem of the increasing prevalence of LGBT+ behavior in society that has had a real impact on various aspects of people's lives. Most Indonesian people postulate that LGBT+ behavior is sexual deviant behavior that is contrary to the social moral values that exist in society, religious values, and these acts are not included in the conception of human rights as they continue to be postulated in pro-LGBT+ groups. In this regard, when referring to Article 28 J paragraph (2) which basically regulates the existence of restrictions in exercising rights and freedoms stipulated by law where everyone is obliged to submit to these limits, it is intended to ensure respect for the rights and freedoms of others by considering morals, religious values, security and public order<sup>39</sup>.

Considering all the aspects that have been described above, the lawmakers should conduct a more in-depth review related to the relevance of the regulations related to same-sex sexual acts in the National Criminal Code by looking at the reality of the problems faced by the community. In this regard, lawmakers can consider specifically regulating this sexual deviant behavior through the establishment of a special law (*lex specialis*), which aims not

<sup>37</sup> I Gde Yasanegara, "Urgensi Asas Legalitas Dalam Pembaharuan Hukum Pidana Nasional Di Indonesia," *Kerta Dyatmika* 13, no. 1 (2016): 1-17, <http://ejournal.undwi.ac.id/index.php/kertadyatmika/article/view/384>.

<sup>38</sup> U Sofwatin et al., "LGBT in Legal and Criminology Aspects," *Unnes Law Journal* ..., 2019, 9-54, <https://doi.org/https://doi.org/10.15294/ulj.v5i1.31053>.

<sup>39</sup> Eka NAM Sihombing, "Perilaku LGBT Dalam Perspektif Konstitusi Negara Republik Indonesia Dan Putusan Mahkamah Konstitusi Nomor 46/PUU-XIV/2016," *Jurnal EduTech* 5 (2019): 13-20, <https://doi.org/10.30596/edutech.v5i1.2758>.

only to focus on the aspect of repressive punishment but can also function as a means of prevention, as well as provide assistance in order to restore proportionate and contextual behavior of perpetrators. Thus, criminal law should not be a tool to justify stigma, but rather an instrument of justice and a monodualistic balance between the general interests of society and individual interests.

## CONCLUSION

The criminal policy on same-sex intercourse in the National Criminal Code is considered to still have legal weaknesses in criminalizing acts of same-sex intercourse. The criminal policies that regulate same-sex intercourse are contained in Article 411 concerning adultery and Article 414 concerning the violation of Law Number 1 of 2023. Based on the results of the analysis of the article formulation in the two articles, two points of weakness were found in the criminalization of same-sex sexual intercourse. First, the criminal law only recognizes the concept of intercourse between men and women. Second, the act of same-sex intercourse between adults (mutual affection) cannot be subject to criminal punishment if the act of intercourse is not carried out in one of the 3 conditions, namely in public, there is a forcible attempt with violence or threat of violence, an attempt is made to publish it as pornographic content. Thus, if same-sex intercourse (mutual consent) is carried out in a private space, then the act cannot be subject to punishment, so it is necessary to expand the norms in the formulation of *a quo* articles. The efforts that can be made by lawmakers by considering the special regulation of sexual deviant behavior through the establishment of a *lex specialis* law, which aims not only to focus on repressive punishment alone, but also on its function as a preventive means, as well as a means of providing assistance in order to make reparations for the behavior of perpetrators.

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