
Same-Sex Marriage as a Human Rights Freedom in Indonesia: The Perspective of Pancasila and the Marriage Law

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Abstract

Human rights are basic rights that are inherent in humans, so the state is obliged to protect, respect and defend them. Same-sex marriage is a human right. The purpose of this paper is to find out how the legal perspective in Indonesia regarding the legality of same-sex marriage on the basis of freedom of human rights. This research method is normative based with an analytical approach. The results of this study conclude that same-sex marriage on the basis of freedom of human rights does not have a philosophical legal standing because it is contrary to the values contained in Pancasila as the ground norm in Indonesia. On the other hand, Sociologically, same-sex marriage is not in accordance with the culture and culture of the Indonesian nation where its citizens are citizens who uphold the values of the Almighty God. Substantially, same-sex marriage legislation is also not contained in Law No.1 of 1974 concerning marriage which has been changed to Law No. 16 of 2019 concerning amendments to Law No. 1 of 1974 concerning marriage.

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1. Introduction

Indeed, human rights exist since humans are born. This is because human rights come from a person's status as a human being, so that in principle they are obliged to get full protection. Fighting for the protection of human rights is a big concern for all stakeholders in the world because human rights are closely related to human existence itself.¹

The civilization of human life faces many advances from year to year, one of which is the advancement of understanding and understanding of human rights where in this context, the state becomes the main legal subject, because the state is the main pillar that is most responsible for protecting, upholding, and advancing the existence of human rights. Human Rights.²

Human rights are basic rights that naturally exist in humans, are universal and lasting, therefore must be protected, respected, maintained, and should not be ignored, reduced, or taken away by anyone.³ The existence of these human rights is the main task of the state in providing basic services to the community for their needs.⁴ The service is also formed in the existing legal provisions as contained in the 1945 Constitution of the Republic of Indonesia Article 1 paragraph (3) that the Indonesian state is a state of law.

The existence of human rights is explicitly stated in the 1945 constitution which is contained in Chapter XA which consists of articles 28a to 28j, Indonesia highly respects and provides high protection for the existence of human rights. This constitutional provision on human rights was born because of Indonesia's commitment to the Universal Declaration of Human Rights on December 10, 1948 by the United Nations which contained 30 articles.

¹ Sanawiah, S. (2016). Perkawinan Sejenis Menurut Hak Asasi Manusia Dalam Perspektif Hukum Islam. *Anterior Jurnal*, 16(1), 77–83. <https://doi.org/10.33084/anterior.v16i1.69>, p.79

² Situmorang, V. H. (2019). Kebebasan Beragama Sebagai Bagian dari Hak Asasi Manusia. *Jurnal HAM*, 10(1), 57. <https://doi.org/10.30641/ham.2019.10.57-67>, p.59

³ See the considering point of Law of The Republic of Indonesia Number 39 of 1999 on Human Rights

⁴ Muamar, A. (2012). Kebebasan Beragama dan Problematika Ham Universal. *KALIMAH*, 11(1), 56. <https://doi.org/10.21111/klm.v11i1.484>, p.58

Furthermore, law enforcement on human rights is stated in Law No. 39 of 1999 concerning Human Rights. This is a rule for all human rights holders to implement their freedom.⁵ Therefore, one part of the expression of freedom of human rights in Indonesia, including marriage. Where the marriage is an inner and outer bond between 2 (two) human beings as husband and wife with the aim of forming and building a family. The purpose of marriage is to form a happy and harmonious family. Happiness and harmony depend on the choice of life of every human being which is part of his human right to build and form a family.

Marriage is considered the most basic entity in determining the direction of civilization and the progress of human rights of the Indonesian nation so the state as the main legal subject issued Law No. Law No.16 of 2019 concerning amendments to Law No. 1 of 1974 on marriage as a tool for every citizen in expressing his freedom of human rights in building and forming his family.

2. Problem Statement

One of the expressions of freedom of human rights in marriage is choosing a life partner. However, what if someone chooses their life partner from the same sex, where a man chooses to marry a man or woman chooses to marry a woman with the argument of freedom of human rights. Therefore, there have been pros and cons from various social elements on the issue of same-sex marriage in Indonesia in recent years, the author would like to analyse the issue of same-sex marriage in the Pancasila perspective as a way of life in the nation and state or as a *volkgeist* of the Indonesian nation, and also marriage law perspective.

3. Methods

The method used in this research is a normative legal research method, namely library research consisting of primary legal materials in the form of laws and regulations, which are related to this research, and secondary legal materials in the form of legal journals, legal books and various written expert opinions which related to the research. The approach used in this study uses an analytical approach in the form of a statute approach, namely by examining and analyzing various laws and

⁵ Erfandi. (2014). *Parliamentary Threshold Dan HAM Dalam Hukum Tata Negara Indonesia*. Setara Press. p.47

regulations related to legal issues in this research, and a conceptual approach, namely by dissecting books, journals and legal media related to this research. The analysis used is a qualitative analysis, namely analysis by providing illustrations using words on the findings based on the object of study.

4. Discussion

4.1. Freedom of Human Rights in The Perspective of Pancasila as a *Vollgeist*

The legalization of the human rights is mentioned in the Universal Declaration of Human Rights as a guide for all citizens of the world to fulfill and protect their human rights as human beings. The declaration seems to be a tool to open the widest possible space for the freedom of human rights throughout the world community regardless of the political system, culture and culture of each country that wants to adopt it.

Indonesia as one of the countries that highly respect the existence of human rights as well as a country that takes part in referring to the universal declaration of human rights in the world by following up on various regulations including MPR Decree No. XVII/MPR/1998 concerning Human Rights, Law No.39/1999 on Human Rights and Law No. 26 of 2000 concerning the Human Rights Court and ratified the international covenant on civil and political rights through Law No. 12 of 2005 concerning the ratification of the international covenant on civil and political rights.

As a state of law, in formulating all its instruments it should be based on Pancasila as the spirit that underlies the implementation of the legal system in Indonesia. Pancasila as a *volkgeist* is a value system in the life of the nation which is explored based on cultural aspects.⁶ Meaning that all legal instruments to be formulated must be in-line with the cultural values that live and grow in society. Therefore, same-sex marriage on the basis of freedom of human rights is contrary to the values contained in Pancasila itself as stated in the second precept that humanity is just and civilized. In the view of Indonesian culture, same-sex marriage on the basis of freedom of

⁶ Dedihasriadi, L. O., & Nurcahyo, E. (2020). Pancasila Sebagai Volkgeist: Pedoman Penegak Hukum dalam Mewujudkan Integritas Diri dan Keadilan. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 9(1), 142. <https://doi.org/10.24843/jmhu.2020.v09.i01.p10>, p.143

human rights is an uncivilized act which is not in-line with the values that grow and develop in the Indonesian society.

Law no. 12 of 2005 has emphasizes that it must be in line with legal values that exist within the jurisdiction of every country that highly respect the existence and freedom of human rights as long as it does not result in discrimination on the basis of race, color, sex, language, and religion.⁷ Meaning that Indonesia as an independent country surely respect and uphold international agreements on freedom of human rights as long as it is in-line with Pancasila as the highest norm in the hierarchy of the legal system in Indonesia. Article 2 of this law also emphasized that every country respects and guarantees the rights recognized in this covenant for people who are in its territory and subject to its jurisdiction without any distinction such as religion, political opinion, national or social, ownership and descendants.⁸

The existence of this covenant civil and political rights clearly emphasizes to every country that has its own jurisdiction to make limitations on the rights of citizens, including one-sex marriage if it conflicts with Indonesian cultural values, as long as the state does not prohibit the provisions contained in article 2 of the law. This kind of marriage is also of course not in line with the principles contained in the universal declarations of human rights as stated in Article 16 paragraph (1) that men and women who are adults with no restrictions on nationality, citizenship or religion, have the right to marry and to build a family.⁹ Thus, the provisions of the meanings and phrases of men and women in the article clearly state that marriage can only be carried out and permitted if it is carried out by a man and a woman.

In addition, the first principle of Pancasila, "Belief in One and Only God", meaning that every citizen who lives in the legal system in Indonesia without exception must have religion and belief in God. In another words, people who live in an Indonesian cultural environment are people who uphold divine values which are perfectly practiced in their daily religious life. Therefore, same-sex marriage on the basis of freedom of

⁷ General Section 3 of Law of The Republic of Indonesia Number 12 of 2005 on the Ratification of The International Covenant on Civil and Political Rights

⁸ Article 2 of Law of The Republic of Indonesia Number 12 of 2005 on the Ratification of The International Covenant on Civil and Political Rights

⁹ Article 16 (1) of Universal Declaration of Human Right

human rights is very contrary to divine values because in principle there is no religion that justifies the same-sex marriage in its faith.

The prohibition of same-sex marriage, when referring to Islamic law as the majority religion in Indonesia which is also part and implementation of the first principle of Pancasila, explicitly mentions several verses in its book, namely the Qur'an, "why do you have sex with fellow men among humans, and you leave the wives your Lord made for you, even you are transgressors."¹⁰ In addition to this verse, there is also a prohibition on same-sex marriage in other verses, the Qur'an Surah al-Naml verse; 54-55, the Qur'an surah al-'Ankabut verse ; 28-29, the Qur'an surah al-A'raf verse ; 80-81. Thus, Islamic law strictly prohibits the existence of same-sex marriages because in principle, it violates the nature of human beings who in fact are God's creations. In addition, Christianity as the second largest religion in Indonesia also mentions in the Bible, Surah 18 Imamat verse 22, same-sex sex as an abomination, a disgusting sin.¹¹ This has also been said by Pope Francis as the high priest of Catholic Christianity who once said strongly condemning same-sex marriage as he said that the Catholic Church will not bless same-sex marriage because God cannot bless sin.¹²

Islamic law as part of the law that lives in Indonesian culture, its existence is also regulated in Presidential Instruction No. 1 of 1991 concerning the dissemination of compilations of Islamic law which essentially emphasizes that same-sex marriage is not part of the law and culture that exists in Indonesia. The prohibition of same-sex marriage is also stated in the fatwa of MUI (Indonesian Ulema Council) number 57 of 2014 concerning lesbian, gay, sodomy and obscene in the legal provisions point 1 stating that sexual relations are only allowed for someone who has a husband and wife relationship, namely male and female couples based on a law.¹³ The existence of this MUI's fatwa strengthens the validity that marriage can only be carried out when it consists of a man and a woman, not between a man and a man or vice versa. This MUI's fatwa is the embodiment of the first principle of Pancasila.

¹⁰ QS. al-Syu'ara': 165-166

¹¹ Injil, imamat 18:22

¹² VOA Indonesia. (n.d.). *Larang Perkawinan Sesama Jenis, Vatikan: Tuhan Tak Dapat Berkati Dosa*. Retrieved September 20, 2022, from <https://www.voaindonesia.com/a/larang-perkawinan-sesama-jenis-vatikan-tuhan-tak-dapat-berkati-dosa/5815635.html>

¹³ Provision Point 1 of MUI's Fatwa No. 57 of 2014 on Lesbian, Gay, Sodomy and Obscene

As human existence as a creature of God and is a gift that must be respected and protected by the state, law and government.¹⁴ Thus, same-sex marriage is not the nature of existence given by God to humans to be protected by the state, law and government. Because as a country that upholds divine values in the life of the nation and state, surely the law must be in line with the values of life contained in Pancasila.

In addition, in the 1945 Constitution of the Republic of Indonesia, which is the basis for the constitution in Indonesia, Article 29 paragraph (1), “the state is based on God Almighty”. It has been explained to us that the existence of the Indonesian state must be in-line with legal that cannot be separated from the teachings of God as contained in the first principle of Pancasila. More explicitly that the Indonesian constitution expressly prohibits the existence of same-sex marriage on the basis of freedom of human rights because it is contrary to the values that live in the norms taught by God as stated in Pancasila. The construction of marriage contained in the 1945 Constitution of the Republic of Indonesia actually aims to build a family and give birth to offspring who are submissive and obedient to the restrictions set forth in the legislation.¹⁵

Even in the MPR Decree No. XVII/MPR/1998, Indonesia at that time assigned state institutions and government officials to respect, uphold and disseminate an understanding of human rights to all Indonesians as long as they in-line with Pancasila and the 1945 Constitution.¹⁶ It became the first ratification of the Universal Declaration of Human Rights from the United Nations as an internal instrument of state law in instructing all state apparatus to protect human rights. Since its independence, Indonesia has realized the importance of the existence of freedom of human rights as long as it does not conflict with Pancasila. Meaning that same-sex marriage on the basis of freedom of human rights are values of life that are far from the principles of Indonesian culture which are contrary to Pancasila.

¹⁴ Article 1 of Law of The Republic of Indonesia Number 39 of 1999 on Human Rights

¹⁵ Sihombing, E. N. (2019). Perilaku LGBT Dalam Perspektif Konstitusi Negara Republik Indonesia dan Putusan Mahkamah Konstitusi Nomor 46/PUU-XIV/2016. *EduTech: Jurnal Ilmu Pendidikan Dan Ilmu Sosial*, 5(1), 13–20. <https://doi.org/10.30596/edutech.v5i1.2758>, p.17

¹⁶ Considering Point of Article 1 and 2 of Decree of MPR No. XVII/MPR/1998 on Human Rights

The enactment of Law Number 39 of 1999 concerning Human Rights which is part of the follow-up to the MPR Decree No. XVII/MPR/1998 also consistently emphasized Indonesia's commitment to protect and promote the freedom of human rights. However, the freedom of human rights has limitations as long as it does not conflict with the values of Pancasila.

The existence of same-sex marriage on the basis of freedom of human rights in the perspective of law number 39 of 1999 is in line with the values contained in Pancasila as stated in article 70 of this law that "in exercising his rights and freedoms, everyone is obliged to obey to restrictions set by law in order to ensuring the recognition and respect for the rights and freedoms of others and to meet just demands in accordance with considerations of morality, security and public order".¹⁷

Same-sex marriage on the basis of freedom of human rights in everyday life is considered a marriage that is far from the values of moral considerations and public order so that it is considered not part of the expression of freedom of human rights protected by law and Pancasila. Pancasila is not only considered as a basic norm (ground norm)¹⁸ but also a philosophy of life for the Indonesian nation, where the values of life that are actualized in society such as politics, social, culture and religion are in line with Pancasila.

4.2. Same-Sex Marriage in the Perspective of Marriage Law

The beginning of the tumultuous of same-sex marriage started since the enactment of the decision of the United States Supreme Court which thoroughly legalized same-sex marriage in 50 states on June 26, 2015 where the human rights of same-sex marriage are the same terms and conditions as regular marriage.¹⁹

Along with the journey of the Indonesian as a state of law, national development must be in line with law development, meaning that development activities, both in the form of developing human resources and natural resources, must be in line with law

¹⁷ Article 70 of Law of The Republic of Indonesia Number 39 of 1999 on Human Rights

¹⁸ Pinasang, D. (2012). Falsafah Pancasila Sebagai Norma Dasar (Grundnorm) Dalam Rangka Pengembangan Sistem Hukum Nasional. *Jurnal Hukum Unsrat*, 20(3), 1–10. p.1

¹⁹ Wikipedia. (n.d.). *Perkawinan sejenis di Amerika Serikat - Wikipedia bahasa Indonesia*, ensiklopedia bebas. Retrieved September 20, 2022, from https://id.wikipedia.org/wiki/Perkawinan_sejenis_di_Amerika_Serikat

based on the values contained in Pancasila. One of these national developments is to organize and regulate the mechanism of marriage as a manifestation of the sustainability of the life of the Indonesian nation in the long term.

In this provision of human rights and freedoms, it is also stated in Law No. 39 of 1999 concerning human rights stating that everyone has the right to be happy, safe, peaceful, and prosperous physically and mentally.²⁰ This means that every human being has the right to be happy, including choosing a partner to marry. Furthermore, the freedom of every human being is supported in Article 26 of Law no. 12 of 2005 concerning the international covenant on civil and political rights that all people are equal before the law and are entitled to equal protection of the law without any discrimination. The elaboration of the provisions of this article certainly does not stand alone, meaning that the existence of human being in determining their freedom is protected by the state as long as they do not conflict with the legal norms that apply in Indonesia.

The freedom of human rights in the case of same-sex marriage is highly contrary to the legal norms that apply in Indonesia. This is surely in line with the provisions of Indonesian law, which specifically regulates on human rights, which state that every person and individual has the right to build a family and have their offspring through a legal marriage.²¹ Nevertheless, the legal marriage in Indonesia must be in line with the legal provisions governing marriage itself, namely through Law no. 1 of 1974 which specifically regulates the marriage of Indonesian citizens.

The enactment of Law No. 1 of 1974 concerning marriage which has been changed to Law No. 16 of 2019 concerning amendments to Law No. 1 of 1974 concerning marriage which regulates all the implementation of human rights freedoms, especially marriage in building a family. Article 1 of the law provides a definition of marriage in Indonesia 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 belief in One and Only God.

²⁰ Chapter III, Article 9 (2) of Law of The Republic of Indonesia Number 39 of 1999 on Human Rights

²¹ Article 10 (1) of Law of The Republic of Indonesia Number 39 of 1999 on Human Rights

If we examine further the word by word the meaning of Article 1 of this law, it will be found that marriages that occur in Indonesia can only be carried out between a man and a woman meaning that the occurrence of inner and outer bonds can only be carried out when the two parties must be of different gender as a legal subject in the marriage. Therefore, that same-sex marriage on the basis of human rights there is no chance to be carried out because the legal subjects are same type. The Universal Declaration of Human Rights clearly states that the family is a natural and fundamental unitary component of society that is entitled to get protection from society and the state.²² Human being by nature who are creations of God Almighty will only be able to build a family and create offspring naturally when the marriage is carried out by a man and a woman.

The existence of universal declarations of human rights as a ground norm in the preparation of rules on human rights in all countries also explicitly states that a natural relationship in a marriage will only occur when it is carried out between men and women not through same-sex marriage.

In addition, the same gender as the legal subject in the marriage, same-sex marriage also does not make a long contribution to the progress of human civilization and the nation because national civilization can only advance and develop due to the birth of new generations as a result of marriage between a man and a woman. As the purpose of the enactment of the law is to provide the principle of the broadest benefit to the progress of the nation and human life.

Marriage in the view of Indonesian law, apart from being oriented to the obligation of gender differences as legal subjects in building inner and outer bonds, also must be able to give birth and carry-on long-term offspring. Apart from these two objectives, no less important is that marriage in the perspective of Indonesian law must uphold the values that live in Pancasila as correlated with the first principle of Pancasila and Article 1 of this Marriage Law.

In addition to the validity of marriages due to gender differences as legal subjects, this marriage law, as stated in Article 8, prohibits the occurrence of marriages whose

²² Article 16 (3) of Universal Declarations of Human Right

religion is prohibited by marriage. This means that with this provision all existing and official religions in Indonesia confirm that same-sex marriage is highly contrary with the values written in the holy books of all religions in Indonesia without exception. Likewise, Article 13 of this law also states that marriage can be prevented, if there are parties who do not meet the requirements for marriage, this shows that in addition to being contrary to religious values and beliefs that live in Indonesia, marriage can only be carried out when substantially the elements of the legal subject are fulfilled, namely those who will carry out a marriage consisting of a man and a woman. Not a man and a man or vice versa.

Although the existence of same-sex marriage is part of the freedom of human rights which are regulated and protected by law. The idea and the journey of origin of the protection of human rights freedoms comes from the concept of a western, but the implementation of law in Indonesia is very different from the legal system that is actualized in the west because Indonesia, apart from being a state of law, also makes Pancasila the highest source of guidance in shaping and formulating the legal development in Indonesia.

Therefore, same-sex marriage is an act that is not in accordance with the constitution and the provisions of laws and regulations in Indonesia and is far from the values that live and develop in the life desired by Pancasila as a *volkgeist*.

5. Conclusion

In the end, same-sex marriage on the basis of freedom of human rights cannot be actualized in Indonesia because it is contrary to Pancasila as a philosophical aspect as well as a ground norm, namely the source of all sources of Indonesian law. In addition, same-sex marriage on the basis of freedom of human rights is also contrary to the constitution and laws and regulations as the juridical basis of the Indonesian state because there are no norms governing its implementation. The existence of same-sex marriage on the basis of freedom of human rights is also highly contrary to the culture and values that live in the culture of the Indonesian nation which upholds civilization as stated in the 2nd principle of Pancasila.

References

Books

Erfandi. (2014). *Parliamentary Threshold Dan HAM Dalam Hukum Tata Negara Indonesia*. Setara Press.

Journal

Dedihasriadi, L. O., & Nurcahyo, E. (2020). Pancasila Sebagai Volkgeist: Pedoman Penegak Hukum dalam Mewujudkan Integritas Diri dan Keadilan. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 9(1), 142. <https://doi.org/10.24843/jmhu.2020.v09.i01.p10>

Muamar, A. (2012). Kebebasan Beragama dan Problematika Ham Universal. *KALIMAH*, 11(1), 56. <https://doi.org/10.21111/klm.v11i1.484>

Pinasang, D. (2012). Falsafah Pancasila Sebagai Norma Dasar (Grundnorm) Dalam Rangka Pengembangan Sistem Hukum Nasional. *Jurnal Hukum Unsrat*, 20(3), 1-10.

Sanawiah, S. (2016). Perkawinan Sejenis Menurut Hak Asasi Manusia Dalam Perspektif Hukum Islam. *Anterior Jurnal*, 16(1), 77-83. <https://doi.org/10.33084/anterior.v16i1.69>

Si hombing, E. N. (2019). Perilaku LGBT Dalam Perspektif Konstitusi Negara Republik Indonesia dan Putusan Mahkamah Konstitusi Nomor 46/PUU-XIV/2016. *EduTech: Jurnal Ilmu Pendidikan Dan Ilmu Sosial*, 5(1), 13-20. <https://doi.org/10.30596/edutech.v5i1.2758>

Situmorang, V. H. (2019). Kebebasan Beragama Sebagai Bagian dari Hak Asasi Manusia. *Jurnal HAM*, 10(1), 57. <https://doi.org/10.30641/ham.2019.10.57-67>

Law

Universal Declaration of Human Right

Law of The Republic of Indonesia Number 39 of 1999 on Human Rights

Law of The Republic of Indonesia Number 12 of 2005 on the Ratification of The International Covenant on Civil and Political Rights

Official Web

VOA Indonesia. (n.d.). *Larang Perkawinan Sesama Jenis, Vatikan: Tuhan Tak Dapat Berkati Dosa*. Retrieved September 20, 2022, from <https://www.voaindonesia.com/a/larang-perkawinan-sesama-jenis-vatikan-tuhan-tak-dapat-berkati-dosa/5815635.html>

Wikipedia. (n.d.). *Perkawinan sejenis di Amerika Serikat - Wikipedia bahasa Indonesia*,

ensiklopedia bebas. Retrieved September 20, 2022, from https://id.wikipedia.org/wiki/Perkawinan_sejenis_di_Amerika_Serikat