

Criminalization toward LGBT Community and its Implementation through the Aceh Qanun in Indonesia

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Abstract

This paper discussed some Criminal Laws on LGBT community regulated in the Criminal Code and in special legal provisions outside the Criminal Code. It also discussed criminalization toward LGBT people through the Aceh Perda, regulated in the Aceh Qanun and its implementation through the Banda Aceh Sharia Court. In the criminal law stipulated in the Indonesian Criminal Code today and in the legal provisions outside the Penal Code, some of the illegal acts committed by LGBT people are liable to imprisonment. The criminal law stipulated in the Aceh Qanun cleanly regulates the acts of lesbian and gay people as the ones which are strictly prohibited and liable to being punished. Therefore, based on this Aceh Qanun, their acts are considered as criminal acts. Aceh Qanun (which is considered as the Aceh Perda or Government Regulation), has criminalized the acts of LGBT people. In Aceh, committing sexual intercourse of gays and lesbians has been formulated in Article 63 and Article 64 of the Aceh Qanun No. 6/2014. The violation against these Articles has been implemented on the perpetrators who are punished with 'uqubat' or whipped 85 times before public as it is found in the Banda Aceh Sharia Court's Verdict No. 19/JN/2017/Ms.Bna on May 17, 2017.

Keywords: criminalization, LGBT, aceh, qanun, indonesia

Introduction

In Indonesia, criminalization toward LGBT (the acronym of Lesbian, Gay, Bisexual, and Transgender) community is still in pros and cons even though some of their acts have been regulated in the Indonesian Penal Code which originally came from Dutch Criminal Law (*Wetboek van Strafrecht*). The term, LGBT has been used since the 1990s. Lesbian is the term for a homosexual woman who is led to her sexual orientation with other women or a homosexual woman who loves other women physically, sexually, emotionally, or spiritually. Gay is the term for a man who is led to his sexual orientation with other men or a man who loves other men physically, sexually, emotionally, or spiritually. Discussion on LGBT has been done from various points of view. Several researches reveal that sexual orientation is the enabling factor of discrimination for employment and vocational training.¹ The content analysis shows that trans-individuals experience physical, sexual, and emotional violence, in addition to experiencing discrimination in employment, housing,

and healthcare,² Even though some companies do not care about homosexual marriage.³ Besides that, there is another writer who writes about the need for an approach viewed from security point of view toward the LGBT.⁴ In New Delhi, India, the government has decided that the act of LGBT is not a criminal act. In fact, in July, 2009, the Delhi Court ruled that consensual same-sex relations between adults in private could not be criminalized.⁵

This research analyzed two problems. First, it was concerned with law/legal provisions in Indonesia which regulate the criminalization toward LGBT people (not discriminative) in which it was regulated in the Criminal Code (in effect throughout Indonesia), and secondly, it was in specific regulations which were found in the Aceh Qanun (it was specifically in effect in Aceh Province). Therefore, this writing was related to the acts of LGBT people although it was not related to LGBT as individuals or their rights in politics, economic affairs (occupation), etc. Therefore, it was not discriminative toward LGBT as a group of people. It was focused on the regulations on their bizarre sexual behavior

Regulation on the Acts of LGBT People in the Indonesian Criminal Law

Indonesia as a Unitary State and a Republic consists of several provinces which are divided into districts/towns. One of the provinces is Aceh Province that has the authority to make laws which are based on the Islamic Law as it is stipulated in Law No. 44/1999 and Law No. 11/2006.

In general, the provision on illegal acts (criminal acts) in Indonesia is regulated in the Criminal Code which comes from Dutch Government. Besides that, some criminal acts are specifically regulated outside the Criminal Code as a Special Law which partially regulates certain criminal acts. LGBT is not specifically regulated in the Criminal Code and in the other Special Laws. However, some acts which are related to LGBT (even though they are not indirectly related to it) are regulated in Article 281, Article 292, and Article 293 of the Criminal Code. Besides that, it is also regulated in the Law on Pornography (Article 4 of Law No. 44/2008), Law on Child Protection (Article 76E in conjunction with Article 82 of Law No. 35/2014).⁶

Criminalizing LGBT People Based on the Aceh Qanun

Aceh Province as one of Aceh Special Regions which has been given the authority to regulate and make its Regional Regulation, based on the Islamic Sharia Law, has regulated the case of LGBT specifically in the Aceh Qanun No. 6/2014 on Jinayat Law (law on criminal matters).

The regulation which is regulated specifically in this Qanun is on Lesbians and Gays. Therefore, Aceh has done the process of criminalization toward LGBT people (especially toward Lesbians and Gays), a process to determine an act which has been originally not a criminal act is made and formulated as a criminal act.⁷ It is included in the criminal policy as it is pointed out as the science of crime prevention.⁸ This criminal policy is through some stages or processes (three stages): formulation policy stage, application policy stage, execution policy stage. In the formulation stage which occurs in the stage of a certain act is determined or formulated in the legal provisions by legislative institution (Law Maker Institution); it is a criminal act which is liable to be punished. The application stage is the stage of law enforcement by judicative institution (Law Enforcement Institution) on any violations against

what has been formulated in the previous legal provisions (in the formulation stage). Therefore, when there is an act which has been formulated in law, its perpetrator will be tried to be determined his sentence through the court's trial. In the execution stage is a stage where the verdict which has been handed down by the court will be executed by the executive institution according to what is read in the court's verdict.^{9,10}

Formulation Stage in the Acts of LGBT People in the Qanun

The Qanun is actually the regulation in the level of Perda (Regional Regulation) which is in effect only in Aceh Province. The regulation in this Qanun is based on Law No. 11/2006 on The Law on the Governing of Aceh (henceforth abbreviated as LoGA) as it is stipulated in Article 1 of the LoGA. This Qanun cannot be equalized with the Regional Regulations of the other provinces or districts/towns in Indonesia. Therefore, equalizing the Qanun with the other government regulations in the other provinces in Indonesia is basically inaccurate. Qanun constitutes a legal provisions or legislation which content has to be based on the Islamic Sharia and is in effect only in the Special Region of Aceh Province which is, of course, different from the other regions which Regional Regulations are not always based on the Islamic Sharia.

Therefore, Qanun is not the same as Perda because its content has to be based on the Islamic principle or it must not be contrary to the Islamic Sharia. In the case of the hierarchy of laws in Indonesia, according to Law No. 12/2011 on the establishment of legislation, the position of Qanun is equalized with Perda in the other regions.

In the explanation of Article 7, letter f, it is stated that the types of provincial regulations include Qanun which is in effect in Aceh Province, Perdasus (Special Regional Regulations), and Perdasi (Provincial Regulations) in Papua Province and Papua Barat Province.

The position of Qanun is recognized in the hierarchy of the Indonesian legislation and is equalized with Perda. Understanding Law No. 12/2011 on the establishment of this legislation can be accepted in the case of the position of Qanun. This understanding will make easier for the Central Government to supervise and foster Regional Governments, especially those which are related to the establishment of regional policies. Nevertheless, we have to pay attention to the specificity given by the Central Government to Aceh. For example, based on the

specificity given by the Central Government to the Aceh Provincial Government, the House of Representatives of Aceh can validate Qanun on Jinayat or the Islamic Criminal Justice as law of procedure in the Sharia Court. Nevertheless, the Aceh Provincial Government has to fulfill the requirements for the product of Qanun as it is embodied in Chapter XVII of the Islamic Sharia and Its Implementation which is regulated in Article 125 of Law No. 11/2006 on Aceh Provincial Government.

The application stage is the upholding of law by judicative institution to apply legal provisions toward perpetrators who commit criminal acts according to the formulation of the law. One of the examples of the implementation of Qanun No. 6/2014 is the act of homosexual as it is stipulated in Article 63 of the Aceh Qanun No. 6/2014. The act of a gay in the Qanun is called Liwath committed by MT and MH on March 28, 2017 (the indictment was done separately). MT was charged by the prosecutor of having committed Jarimah Liwath as it was stipulated in Article 63, paragraph (1) in conjunction with Article 1, figure 28 of Aceh Qanun No. 6/2014. He was punished with caning sentence with 80 (eighty) times of whipping, reduced by the period of detention. The Judge of the Sharia Court handed down caning sentence of 85 times of whipping reduced by the period of detention as it was handed down in the Banda Aceh Sharia Court's Verdict No. 19/JN/2017/Ms.Bna on May 17, 2017.

The Banda Aceh Sharia Court's Verdict No. 19/JN/2017 on May 17, 2017 was executed by the executioner (as the executor) on May 23, 2017, witnessed by about 1,000 people. It took place in the yard of Lamgugob Mosque, Syiah Kuala Subdistrict, Banda Aceh. The execution was done by the executioner with 83 times of caning sentence. The punishment was reduced two times or equal to 2 months of detention which was in accordance with the Judge's verdict.

Conclusion

It is obvious that the Aceh Qanun which becomes the Special Regional Regulation in Aceh Province has clearly stated that the acts of Lesbians and Gays are considered as criminal acts. Therefore, there is criminalization toward the acts of LGBT people in Aceh, based on the Qanun No. 6/2014. Some provisions of the Qanun have been implemented based on the Banda Aceh

Sharia Court's Verdict and have been executed with caning sentences in 83 times whipping.

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