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The Legal Politics of Criminalizing Homosexual Behavior from the Perspective of Indonesian Criminal Law

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Highlights:

- Criminal Law Politics in Determining Criminalization Policy
- Norm Emptiness
- Legal Politics of Criminalizing Homosexual Behavior in Several Countries
- Analysis of Indonesian Legal Politics from the Perspective of Criminalization Theory and Human Rights
- Reconstruction of Criminal Law Politics in Regulating Homosexual Behavior in Indonesia

Abstract: Criminal law policy is a state instrument in determining criminalization policies for acts deemed to disrupt legal interests, public order, and prevailing values within society. The debate over the regulation of homosexual behavior in Indonesia demonstrates differing views between moral values, religion, human rights, and positive law. On the other hand, Indonesian criminal law does not generally regulate homosexual behavior as a crime, thus giving rise to debate about the existence of a normative gap in providing legal certainty. This study aims to analyze the legal policy of criminalizing homosexual behavior from the perspective of Indonesian criminal law, examine the applicable positive legal regulations, compare them with several countries that still maintain criminalization or certain restrictions on same-sex relations, and formulate criminal law policy directions in accordance with the principles of the rule of law. This study uses a normative legal research method with a statute approach, a conceptual approach, and a comparative approach. The legal materials used include legislation, court decisions, scientific literature, and international legal documents. The results show that the debate over the regulation of homosexual behavior is closely related to the limits of criminalization in criminal law, the

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principle of legality, the protection of legal interests, and national legal policy. The experience of several countries shows that criminalization policies are influenced by constitutional values, public morality, religion, and their respective legal systems. Therefore, the development of criminal law policy in Indonesia must be based on rational, proportional criminalization principles that align with the values of Pancasila, the constitution, and the objectives of national criminal law, thereby achieving legal certainty, justice, and benefit..

Keywords: Legal Politics, Criminalization, Homosexual Behavior, Criminal Law, Comparative Law.

1. Introduction

Criminal law is essentially a state instrument used to protect legal interests through a policy of criminalizing acts deemed detrimental to individuals and society. However, not every act deemed contrary to religious or moral norms can automatically be classified as a crime. In a state based on the rule of law (rechtsstaat), criminalization must be based on the principles of legality, legal certainty, proportionality, and a clear objective of protecting legal interests (Husak, 2008). Therefore, the formation of criminal law is not only influenced by legal aspects, but also represents a manifestation of legal politics that reflects the social, moral, cultural, and constitutional values that develop within a country (Kusumaatmadja, 2006).

The debate over regulating homosexual behavior is one issue that demonstrates the complex relationship between law, public morality, religion, and human rights. In Indonesia, this phenomenon has elicited various responses in the public sphere and in academic discourse. Some believe that homosexual behavior contradicts religious values, moral norms, and the culture within Indonesian society, necessitating clearer legal instruments to maintain public order. Conversely, others emphasize that criminal law should not be used to regulate all moral issues, but rather only those acts that qualify as criminalization based on the principles of legality and the protection of legal interests (Mill, 1859; Hart, 1963).

These differing views demonstrate that the primary issue is not simply the existence of homosexual behavior, but rather the limits of the state's authority to use criminal law as a means of social control. According to Patrick Devlin (1965), the state can use criminal law to uphold public morality if violations of that morality are deemed to threaten the survival of society. Conversely, John Stuart Mill (1859), through his harm principle, argued that restrictions on individual freedom can only be justified if the action causes harm to others. The theoretical debate between legal moralism and the harm principle remains the basis for discussions regarding the limits of criminalization in modern criminal law.

In the Indonesian context, criminal law adheres to the principle of legality, as reflected in Article 1 of the Criminal Code and maintained in the updated National Criminal Code. Consequently, an act can only be punished if it has been expressly defined in statutory regulations. Therefore, law enforcement officials cannot impose a penalty for an act that lacks a clear legal basis. This situation has given rise to debate about whether the applicable regulations provide adequate legal certainty for various forms of behavior deemed contrary to moral values, or whether they still leave what is perceived as a gap in norms in law enforcement practices (Arliman, 2020).

Theoretically, criminalization is part of criminal law policy. According to Barda Nawawi Arief (2011), criminalization is a legislative policy that must consider the balance between social defense,

social welfare, the effectiveness of law enforcement, and respect for citizens' rights. Therefore, the establishment of criminal offenses cannot be based solely on moral judgment but must be supported by philosophical, sociological, and legal arguments that can be scientifically justified. This view aligns with Douglas Husak (2008), who emphasized that the state must not engage in overcriminalization, that is, criminalization that goes beyond the goal of protecting legal interests.

On the other hand, the dynamics of regulations in various countries indicate that policies regarding same-sex relationships are heavily influenced by each country's legal politics. Some countries have decriminalized, basing their policies on the protection of privacy rights and the principle of non-discrimination, while others still maintain criminalization or certain restrictions on grounds of public morality, religious values, public order, and the country's constitutional identity. For example, Uganda, through the Anti-Homosexuality Act 2023, expanded regulations regarding certain criminal offenses related to same-sex relationships, while Nigeria, through the Same Sex Marriage (Prohibition) Act 2014, prohibited same-sex marriage and the activities of certain organizations related to the promotion of such relationships. These differences demonstrate that criminalization policies are a legal political choice influenced by the legal system, constitutional values, and social characteristics of each country (Mubangizi, 2024; ILGA World, 2024).

This debate has also developed in previous research in Indonesia. Some studies have focused on examining homosexuality from the perspective of human rights, Islamic law, and legal sociology. Others have highlighted the protection of the constitutional rights of LGBT groups or the effectiveness of the regulation of moral offenses in the Criminal Code. However, studies specifically analyzing the legal politics of criminalizing homosexual behavior through the approach of criminalization theory, the principle of legality, and legal comparisons with countries that still maintain criminalization policies are relatively limited. Therefore, there is significant research space for a comprehensive examination of the direction of Indonesian criminal law politics in determining the limits of criminalization of homosexual behavior, taking into account modern criminalization theory, Pancasila values, the constitution, and comparative legal developments.

Based on the above description, this study aims to analyze the legal politics of criminalizing homosexual behavior from the perspective of Indonesian criminal law by examining the existing positive legal regulations, identifying debates regarding the lack of norms, comparing them with legal policies in several countries, and formulating the direction of criminal law formation that is in accordance with the principles of the rule of law, the principle of legality, the protection of legal interests, and the values that exist in Indonesian society. This study is expected to contribute to the development of criminal law political theory as well as become a consideration in the formation of national criminal law policy.

2. Methods

This research is normative legal research that focuses on the study of positive legal norms, legal doctrine, legal principles, and the development of criminal law policy regarding the criminalization of homosexual behavior in Indonesia. Normative legal research was chosen because the focus of the research is directed at analyzing criminalization policies from a criminal law perspective, examining the existence or absence of normative gaps, and formulating legal policy constructions that are in accordance with the principles of the rule of law and the formation of legislation.

This study uses four approaches: the statute approach, the conceptual approach, the case approach, and the comparative approach. The statutory approach is used to analyze various relevant legal provisions, including the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 2023 concerning the Criminal Code, and other laws and regulations related to criminal law policy and moral offenses. The conceptual approach is used to examine theories regarding criminalization, the principle of legality, legal politics, legal moralism, the harm principle, and living law as the basis for analyzing the formation of criminal law norms. The case approach is used to analyze the Constitutional Court Decision Number 46/PUU-XIV/2016 as a decision that has relevance to the limits of the authority of lawmakers in carrying out criminalization. Furthermore, a comparative approach is used to compare Indonesia's criminal law policies with several countries that still maintain criminalization or certain restrictions on same-sex relations, such as Uganda, Nigeria, Brunei Darussalam, Qatar, and Saudi Arabia.

The sources of legal materials in this study consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 2023 concerning the Criminal Code, Constitutional Court Decision Number 46/PUU-XIV/2016, as well as laws and legal instruments of comparative countries related to the regulation of same-sex relationships. Secondary legal materials consist of books, national and international journal articles, research results, and expert doctrines discussing legal politics, criminal law, criminalization theory, public morality, and comparative law. Tertiary legal materials include legal dictionaries, legal encyclopedias, and other reference sources that support the understanding of the legal terms and concepts used in the study.

The collection of legal materials was conducted through library research, examining various relevant laws and regulations, court decisions, scientific literature, and academic publications. The analysis of the legal materials was conducted qualitatively using prescriptive methods. The analysis began by identifying legal norms governing criminalization in the Indonesian criminal law system, then examining their conformity with criminalization theory, the principle of legality, criminal law politics, and comparative legal developments. The next step was to analyze Constitutional Court Decision Number 46/PUU-XIV/2016 to assess its implications for the formation of criminal norms.

3. Results

Discussions regarding the criminalization of homosexual behavior in Indonesian criminal law cannot be separated from the fundamental issue of the limits of state authority in using criminal law as an instrument of social control. The primary issue lies not in the existence of sexual orientation as a personal identity, but rather under what conditions the state can justify the use of criminal instruments against behavior deemed contrary to prevailing values within society. From a political perspective, criminalization is not merely a technical act of norm formation, but rather a political legal decision (criminal law policy) that determines the scope of state intervention in citizens' freedoms. Therefore, the establishment of criminal offenses must be understood as a constitutional act that carries the consequence of limiting rights and thus requires strong philosophical, sociological, and legal legitimacy.

3.1. Criminal Law Policy as the Basis for Determining Criminalization

According to Barda Nawawi Arief, criminal law policy is part of national legal policy aimed at achieving the goals of social defense and social welfare (Arief, 2011). Within this framework, criminalization is understood as a legislative instrument for determining whether an act is appropriate for inclusion within the scope of criminal law. This concept has the important consequence that the state is not obligated to criminalize all behavior deemed inconsistent with social or religious values. Instead, the state is obligated to conduct a normative selection of behavior that truly requires criminal intervention.

Theoretically, Barda Nawawi Arief stated that the formation of criminal acts must take into account several parameters, namely:

a. the need for community protection;
b. the existence of a real legal interest;
c. effectiveness of law enforcement;
d. balance between community protection and citizen rights;
e. conformity with the objectives of national law.

Using this framework, the debate on regulating homosexual behavior cannot stop at the argument that such behavior is contrary to religious or moral norms but can be further analyzed in relation to legal interests that specifically require protection through criminal instruments. At this point, criminal law politics rejects a criminalization approach based solely on mere moral disapproval, because modern criminal law demands rationally verifiable justification.

*Legal Interest*As the Justification for Criminalization, in modern criminalization theory, legal interest is the primary basis for the formation of criminal norms. The concept of legal interest developed from Birnbaum's thinking and was then developed in modern criminal law as an instrument to limit the expansion of criminal law. This theory places the protection of legal interests as the primary goal of criminalization. Douglas Husak (2008) emphasized that the state may not use criminal law without demonstrating a real and identifiable legal interest. Using the legal interest approach, there are several frameworks that must be considered before the state carries out criminalization:

a. what legal interests are protected;
b. whether there is any identifiable loss;
c. whether the loss is serious enough;
d. whether non-criminal instruments are no longer adequate;
e. whether criminalization is proportional.

This framework is crucial in discussing homosexual behavior because it demonstrates that criminal law does not operate on the basis of morally acceptable or unacceptable categories. If the state wishes to use criminal instruments, it must clearly demonstrate the relationship between the regulated behavior and the protection of concrete legal interests. This is where the fundamental difference between moral norms and criminal norms emerges. Moral norms can operate based on societal ethical judgments, while criminal norms demand a higher level of legal legitimacy because they result in restrictions on rights and the exercise of state power.

The implementation of these restrictions creates limitations on state intervention in a state based on the rule of law. In a state based on the rule of law (rechtsstaat), the use of criminal law cannot be separated from the principle of limiting power. According to Hans Kelsen, a state based on the rule of law places all state actions within a framework of norms so that state power may not be used arbitrarily.

Meanwhile, in criminal law, this principle is realized through the principle of legality, which implies that the state cannot create criminal acts through moral interpretation, social pressure, or momentary political will. Consequently, the scope for state intervention in citizen behavior is limited by a clear legal basis, the purpose of legal protection, proportionality of restrictions, and legal certainty.

In the Indonesian context, the relationship between religion, morality, and law is inseparable from the state's character, which is based on Pancasila. However, the presence of religious values in the legal system does not necessarily mean that all religious norms must be converted into criminal norms. Theoretically, national criminal law is not built solely on public morality, but also on the principles of legality and the protection of legal interests. Within this framework, religious and moral values serve as sources for the formation of legal policy, but still require normative transformation to become the basis for criminalization. This transformation requires proof that the protected values are truly relevant to the protection of legal interests and public order.

Criminal Law as Ultimum Remedium: This principle positions criminal punishment as a last resort after other legal instruments are deemed inadequate. Muladi explained that the use of criminal law must be selective because it represents the most severe form of state intervention against citizens' rights. Using the ultimum remedium approach, the criminalization of a behavior must first be tested through the effectiveness of non-criminal instruments such as education, social policy, strengthening administrative norms, and other legal instruments.

In the context of this research, this approach is important because it shows whether the state approves or disapproves of a behavior. Thus, Indonesian criminal law policy in determining the limits of criminalization of homosexual behavior should not be directed at expanding punishment based solely on moral preferences, but on strict testing of legal interest, the principle of legality, proportionality, and the function of criminal law as ultimum remedium. Through this approach, the formation of criminal law remains within the framework of a state of law that maintains a balance between protecting public interests and limiting the use of state power.

Criminalization is a concrete form of government intervention carried out through legislation to determine actions or behaviors deemed to violate social and legal norms and subject to criminal sanctions. From a theoretical perspective, criminalization is the foundation of the criminal law system because it establishes a boundary between acceptable behavior and that deemed harmful to social order. However, the decision to criminalize an act cannot be based solely on government whim. A normative framework is needed that emphasizes that criminalization must be a tool to protect the common good without indiscriminately harming individual freedoms. Several principles have been formulated as conceptual guidelines, such as the harm principle, the morality of law, and legal paternalism, each of which provides different justifications for determining the limits of government authority to impose criminal sanctions.(Zul Khaidir Kadir, 2025)

One principle frequently referenced in discussions of criminalization is the harm principle, as expressed by John Stuart Mill. This principle posits harm experienced by others as the sole legitimate reason for the state to restrict individual freedom. In other words, an act can only be considered legitimately criminalized if it causes a real impact on the rights or interests of others. Therefore, behavior that only impacts the perpetrator, as long as it does not pose a danger to society, should not be regulated by criminal law. While seemingly simple, the application of this principle has given rise to various

conceptual debates, particularly in determining what constitutes “real harm.” Are psychological harm, economic harm, or disruption of cultural values considered forms of harm on a par with physical harm? This ambiguity in defining harm creates opportunities for deviation, where actions that do not substantially harm others can be criminalized based on perceived moral or social discomfort.(Zul Khaidir Kadir, 2025)

3.2 Analysis of the Existence or Absence of Normative Gaps in Indonesian Criminal Law Regarding the Regulation of Homosexual Behavior

One of the central issues in the debate regarding the regulation of homosexual behavior in Indonesian criminal law is the argument regarding a normative gap or legal vacuum. This issue is important because it is often used as a basis for arguing for the expansion of criminalization within national criminal law. However, from the perspective of legal theory and the politics of criminal law, the existence of a normative gap cannot be determined solely based on the fact that a behavior has not been explicitly categorized as a crime. Conceptually, a clear distinction must be made between the absence of criminalization and a legal vacuum. The two are distinct concepts with distinct theoretical and legal consequences.

Homosexual acts exist in a legally ambiguous area, with no regulations prohibiting or protecting them. This means that the legal vacuum is one aspect that increases the risk of persecution for people with the same sexual orientation. First, there is no law expressly prohibiting homosexual acts among the various provisions that exist. Clearly, because there is no regulation regarding same-sex sexual relations, protection against these acts is also unavailable. In this context, some experts argue that there is no other law than that specified in the law.(Elvira Agustina & Taun, 2023)

The Criminal Code is the first reference book when seeking punishment for a criminal act, as it contains general provisions for enforcing criminal law. This also applies to the criminal act of homosexual intercourse, as homosexual behavior has not been clearly and comprehensively regulated in the Criminal Code. The only article used as a reference for deviant sexual acts, particularly homosexual indecency or homosexual sexual relations, has so far been Article 292 of the Criminal Code, which stipulates: "Anyone of legal age who commits an indecent act with a person of the same sex, who is known or reasonably suspected to be underage, shall be punished by a maximum imprisonment of five years." This article does not cover all homosexual acts. Article 292 of the Criminal Code only regulates adults engaging in indecent acts or sexual relations with minors, or in other words, the current law only regulates same-sex sexual relations between adults and children. Currently, there are no provisions in the Criminal Code that regulate indecent or homosexual sexual relations between two adults, or between two minors.(Prima et al., 2021).

Hans Kelsen explained that law is a hierarchical system of norms that operates based on a structure of authority determined by the law itself (Kelsen, 1967). Therefore, not every social issue that has not been regulated criminally can automatically be considered a legal vacuum. In many cases, the lack of regulation is actually the result of a conscious legal policy choice made by lawmakers.

In the Indonesian criminal law system, the principle of legality is a fundamental principle that determines the validity of the use of criminal sanctions by the state. The principle of legality is reflected in Article 1 paragraph (1) of the Criminal Code, which essentially stipulates that no act can be punished except based on the provisions of previously existing laws and regulations.

According to Moeljatno (2008), the principle of legality has three main functions:

a. provide legal certainty;
b. limit state power;
c. protect the freedom of citizens.

A consequence of the principle of legality is that the state cannot create criminal acts through moral interpretation or social pressure. In the context of this research, this principle has important implications. If a behavior has not been determined as a criminal act by lawmakers, then law enforcement officials lack the legitimacy to expand the scope of criminal penalties. Therefore, the term "norm vacuum" cannot be used to justify criminalization through interpretation. The principle of legality actually places limits on the state's tendency to expand the use of criminal law.

In modern criminal law discourse, there is a tendency to equate the absence of criminalization with a legal vacuum. According to legislative choice theory, lawmakers have discretion to determine which behaviors will be included in the criminal law. Not all socially contested behaviors must be translated into crimes. Barda Nawawi Arief (2011) emphasizes that criminalization is a legislative policy that must consider legal effectiveness, public protection, and respect for citizens' rights. Using this approach, the absence of general criminal regulations for homosexual behavior does not necessarily indicate that the law has failed. The absence of regulations can be understood as a form of caution by lawmakers in determining the limits of the use of criminal instruments. Theoretically, this position aligns with the concept of restraint in criminalization that has developed in modern criminal law. The state is not required to regulate the entire moral space of society through criminal law.

Article 2 of Law Number 11 of 2012 concerning the Establishment of Legislation states that Pancasila is the primary source of all applicable laws in the country. The process of creating legislation, including those containing criminal provisions, can be interpreted as creating new norms or improving existing ones. New norms or regulations are necessary when existing regulations are found to be deficient. As explained previously in the background section, the legal issue examined here is the lack of norms. This problem relates to the absence of criminal law norms that explicitly regulate sanctions for indecent acts committed by same-sex couples who are both adults. Meanwhile, in practice, such acts exist in society and disrupt the existing legal order. The creation of new norms in criminal law can be understood as an effort to criminalize certain acts. Criminalization can be understood as a legal tool to make behavior previously not considered a crime into a crime in order to combat crime. In this context, Herbert L. Packer argues that efforts to control crime, defined as antisocial behavior through the imposition of criminal sanctions on violators, constitute an important legal dimension in addressing social problems. Efforts to address antisocial behavior by imposing criminal penalties on guilty individuals is a social issue that also has significant legal dimensions.(Prima et al., 2021).

In Indonesia, the debate over the lack of norms must be analyzed through the existing criminal law structure. Amendments to the national criminal code through Law Number 1 of 2023 demonstrate the state's efforts to reform criminal law by considering social values and the character of national law. However, these reforms maintain the basic principles of criminal law, namely the principle of legality and limitations on criminalization. Therefore, criminal law reform cannot be interpreted as legitimizing the unlimited expansion of criminal law. From a legal political perspective, the state appears to be taking a cautious stance, maintaining that the establishment of criminal offenses is the authority of legislators and not the product of law enforcement's interpretation. This approach demonstrates that Indonesian legal politics tends to avoid criminalization based solely on fleeting moral responses.

The concept of open legal policy is crucial for understanding the issue of normative vacuum. Open legal policy is the policy space given to legislators to determine legal options as long as they do not conflict with the constitution. In the context of criminal law, this concept emphasizes that the decision to criminalize or not criminalize a behavior is a legal political decision. This means that the absence of criminalization does not necessarily indicate a legal deficiency. Rather, it may indicate a state decision not to use criminal law as its primary instrument. This position is important because it demonstrates that criminal law is not the sole instrument of social regulation. Educational instruments, social policy, administrative law, and the strengthening of social norms are also part of the state's regulatory system.

Based on an analysis of legal theory, the principle of legality, and the politics of criminal law, this study argues that the debate over regulating homosexual behavior in Indonesia is better understood as a matter of legal political choice rather than a normative vacuum. The absence of general criminalization does not necessarily indicate that the law has lost its regulatory capacity. Rather, this condition indicates the need for restrictions on the use of criminal law to ensure it remains within the corridors of legal interest, proportionality, and the principles of the rule of law. Therefore, if the state in the future considers establishing new criminal norms, the process must be carried out through a legislative mechanism that meets philosophical, sociological, and legal justification and is not based solely on moral arguments or momentary political pressure.

3.3 Legal Moralism and Harm Principle as the Basis for Forming Criminalization Policies against Homosexual Behavior

The debate over the criminalization of homosexual behavior in modern criminal law is fundamentally inseparable from the conflict between two major schools of thought in the philosophy of criminal law: legal moralism and the harm principle. These two theories serve as the primary foundation for explaining the limits of the state's authority to use criminal law against behavior deemed contrary to societal values. Conceptually, the question to be answered is not whether homosexual behavior is socially accepted or rejected, but rather whether the state has the legal legitimacy to use criminal instruments against such behavior.

The criminalization of morally deeming acts has been a controversial debate since the beginning of the debate on “enforcement of morality” between Lord Devlin and HLA Rearrange Hart’s sentence. The debate between them on homosexual behavior and prostitution is very relevant to the discussion on criminalization. Regarding morality, Lord Devlin argued that common morality has an essential role in maintaining society. If the moral bonds that bind society are lost, society will experience disintegration. According to Lord Devlin, the primary function of criminal law is to maintain public morality. In his view, intolerance, anger and irritation deserve to be regulated by various instruments of criminal law.(Sholihin et al., 2023).

The theory of legal moralism gained its most influential form through Patrick Devlin's work in The Enforcement of Morals (1965). Devlin started from the assumption that society is not simply a collection of individuals, but rather a moral community united by a set of shared values. According to Devlin (1965), the state has an interest in maintaining social integration, and if a behavior is widely perceived as undermining the moral foundations of society, the state can use criminal law to restrict that behavior. In this view, the legitimacy of criminal law stems not only from protection against actual harm but also from protection of public morality. Devlin's argument develops from the idea that:

a. every society has shared moral standards;
b. public morality is a condition for the continuity of society;
c. threats to morals can be threats to social order;
d. the state has the right to maintain the moral identity of society.

Based on this, the legal moralism approach is often used to justify the criminalization of behavior deemed deviant from religious norms, morality, or the dominant social structure. In the Indonesian context, this theory often gains legitimacy due to the national legal system's character, which does not completely separate law from religious and moral values. Pancasila, as the foundation of the state, recognizes the religious and moral dimensions in the formation of national law. However, the acceptance of religious values within the legal system does not automatically mean that all moral violations are criminal offenses. At this point, legal moralism faces serious challenges in a modern state governed by the rule of law. First, there is no easy, objective measure for determining when a morality is considered public morality. Second, modern society is pluralistic, thus creating the possibility of differing values. Third, the use of criminal law to maintain morality has the potential to expand the scope for excessive state intervention. Thus, the legal moralism theory allows for criminalization, but still requires limits to prevent it from becoming an instrument of moral domination.

In contrast to Devlin, John Stuart Mill, in On Liberty (1859), developed the harm principle theory, which has become one of the foundations of modern criminal law. Mill stated that individual freedom can only be restricted if a person's actions cause harm to others. This principle is based on two main assumptions. First, individuals have a space of autonomy that must be respected by the state. Second, the state may not use the law to enforce personal morality. Mill clearly distinguishes between actions that harm the perpetrator themselves (self-regarding conduct) and actions that harm others (other-regarding conduct).

According to Mill, only the second category can be justifiably subjected to criminal law intervention. In the context of criminalization theory, the harm principle produces stricter standards of evaluation than legal moralism. Before the state criminalizes, it must prove:

a. the existence of real loss;
b. explainable cause and effect relationships;
c. the need for state intervention;
d. there is no other lighter alternative.

This approach has had a significant influence on the development of modern criminal law because it limits the state's tendency to expand the scope of criminal law. However, Mill's theory has also received criticism. Some scholars argue that not all social harms can be directly measured. Some values, such as morality, public order, and social cohesion, are difficult to translate into individual harms. Therefore, the harm principle cannot always explain all forms of criminal regulation.

The debate on legal moralism developed further through H.L.A. Hart's critique. Hart (1963) rejected Devlin's idea that moral violations are always synonymous with threats to the continuity of society. According to Hart, the existence of moral differences in society does not automatically lead to social disintegration. Hart argued that criminal law must be cautious in using morality as a basis for criminalization because of the significant risk of abuse of power. In Hart's view, a modern state based on law must distinguish between societal moral disapproval and the need to protect legal interests. Hart's

critique is important in this study because it demonstrates that criminal legitimacy cannot be established solely through claims of moral protection. The state must also demonstrate objective legal justification.

In the Indonesian context, the relationship between public morality and criminal law exhibits a more complex character than either the liberal or purely moralistic models. Indonesia does not fully embrace legal secularism, but neither does it position criminal law as a tool for enforcing all religious norms. This character is evident in the construction of national law, which maintains the principles of legality, protection of constitutional rights, religious and moral values, and limitations on the use of criminal law. Therefore, the formation of criminalization policies cannot be based solely on legal moralism or the harm principle in absolute terms. Both need to be positioned in a balanced manner. Moral values can be a source of consideration in legal formation, but the legitimacy of criminal law must still be tested through the protection of legal interests, proportionality, and legal certainty.

Based on an analysis of legal moralism theory, the harm principle, and Hart's critique, this study argues that the use of criminal law against homosexual behavior must be understood as a matter of the limits of criminalization, not simply a matter of moral judgment. The state does have the authority to consider religious and moral values in formulating laws. However, this authority is not unlimited. Criminalization is only legitimate if it meets the following principles:

1. the existence of protected legal interests;
2. the need for community protection;
3. there is a clear legal basis;
4. there is proportionality in the restrictions on rights;
5. the use of criminal law as the ultimum remedium.

Through this approach, criminal law continues to function as an instrument for protecting legal interests without losing the character of a state based on law which limits the use of state power.

3.4 Analysis of Indonesian Legal Politics and Constitutional Court Decision Number 46/PUU-XIV/2016

The debate over the criminalization of homosexual behavior in Indonesia gained significant momentum through Constitutional Court Decision No. 46/PUU-XIV/2016. This decision not only constitutes a legal event but also demonstrates how the relationship between criminal law, public morality, the authority of lawmakers, and the principle of the rule of law is constructed within the Indonesian constitutional system. In the context of this research, this decision is significant because it serves as a meeting point between the theoretical debate on criminalization and the practice of criminal law formation in Indonesia. The main issues that arise are who has the authority to determine the extent of criminalization and what its constitutional limits are.

The judicial review petition, decided in Constitutional Court Decision No. 46/PUU-XIV/2016, essentially requested an expansion of the regulatory scope for several criminal provisions concerning morality. The argument developed in the petition stems from the assumption that existing criminal law does not provide adequate protection for moral values within society. Substantively, this argument is based on three main assumptions:

a. there are social changes that require criminal law reform;
b. there is a need for protection of public morality;
c. there are spaces that are perceived as not yet accommodated in positive criminal law.

This issue then developed into a constitutional issue related to the authority of the Constitutional Court. Because, when viewed in modern criminal law, the principle of legality functions not only as a technique for establishing norms, but also as an instrument for limiting state power. The principle of legality arose from the idea of protecting individual freedom from arbitrary use of criminal law. Moeljatno (2008) explains that the principle of legality places the formation of criminal acts exclusively within the legislative process. Consequently, judges cannot create new criminal acts through interpretation. In the context of Constitutional Court Decision Number 46/PUU-XIV/2016, the principle of legality is the primary basis for legal considerations.

The Court emphasized that expanding the scope of criminalization is not a judicial function. This position demonstrates that Indonesian criminal law maintains the principle that restrictions on citizens' freedoms must be determined through democratic mechanisms. One of the key concepts in the Court's considerations is open legal policy. Open legal policy is the legal policy space granted to legislators to determine the content and direction of regulations as long as they do not conflict with the constitution. In this case, the Court essentially placed the formation of criminal offenses within the legislature's purview. This approach demonstrates the existence of judicial restraint in the formation of criminal law. The Court did not assume the position of a positive legislator.

Theoretically, this position aligns with the theory of separation of powers. Montesquieu explained that lawmaking is a legislative function, while the courts are tasked with enforcing the law. If the courts expand criminal offenses through interpretation, there is a risk of violating legal certainty and restricting rights without democratic legitimacy. Through this decision, the Court demonstrated that changes to the scope of criminalization must be implemented through lawmakers, not through broad constitutional interpretation.

This ruling also demonstrates the character of Indonesian legal politics in responding to the debate between legal moralism and the harm principle. On the one hand, Indonesia recognizes the importance of religious values and morality in the formation of national law. On the other hand, the state maintains the principle that criminal law cannot be applied without a clear legal basis. In this context, Indonesian legal politics appears to take a moderate position. The state does not rule out the possibility of establishing new criminal norms. However, it also does not condone the expansion of criminal law through moral interpretation. This approach demonstrates that the protection of public morality must still be translated into a legal interest framework. Thus, the formation of criminal law must reflect the protected legal interest, the rationality of criminalization, the proportionality of rights restrictions, and the effectiveness of criminal norms.

Constitutional Court Decision No. 46/PUU-XIV/2016 has important implications for the direction of Indonesian criminal law policy. First, the decision affirms that criminalization is a legislative policy. Second, the decision strengthens the function of the principle of legality as a limit on state power. Third, the decision demonstrates that criminal law cannot be used as an automatic response to moral debates in society. Fourth, the decision emphasizes that changes in the criminal law must be carried out through academic study and the legislative process. From the perspective of this research, the decision demonstrates that the debate over regulating homosexual behavior should be positioned within a legal political framework, not merely a moral debate. The formation of criminal law must proceed from an evaluation of the legal interests to be protected, and not solely based on value preferences.

Based on an analysis of Constitutional Court Decision No. 46/PUU-XIV/2016, this study argues that Indonesian criminal law policy tends to maintain a cautious model of criminalization. The state does not leave the formation of criminal law to the dynamics of public opinion or judicial interpretation. Instead, the state positions the legislative process as the primary space for determining the limits of criminalization. This position is crucial for maintaining a balance between protecting social values, respecting citizens' rights, and the principle of the rule of law. If there is a need to establish new criminal norms in the future, the process must be carried out through proving social needs, testing legal interests, and democratic mechanisms in accordance with Indonesian constitutional principles.

3.5 Comparison of Criminalization Legal Politics in Several Countries and Its Relevance for Indonesia

The debate over the criminalization of homosexual behavior is not only developing in Indonesia but has also become a global issue, highlighting fundamental differences regarding the relationship between criminal law, public morality, religion, and the protection of rights. Therefore, a comparative legal approach is crucial to understanding that criminalization is not a universal concept, but rather the result of a political legal construction influenced by the history, legal system, social structure, and constitutional identity of each country. In legal research, comparative law is not intended to determine which country is most correct, but rather to understand the rationale for norm formation and evaluate its relevance to national legal systems.

Alan Watson (1993) explains that law often develops through a process of legal transplantation, namely the adoption or transfer of legal ideas between countries. However, Pierre Legrand criticized that law is never fully transferable because it is always influenced by the cultural context and social construction of each country. Using this approach, this discussion is not directed at a moral judgment of a particular country, but rather at analyzing the legitimate basis of criminalization and its relevance to Indonesian criminal law policy. Several countries defend criminal regulations against same-sex relations by arguing for the protection of public morality, religion, and constitutional identity. This approach starts from the assumption that criminal law not only protects individuals from actual harm but also maintains the value structure considered to be the foundation of society. In this model, the state positions public morality as a legal interest worthy of protection.

Theoretically, this approach is closely related to legal moralism as developed by Devlin (1965). Within the framework of legal moralism, the state gains legitimacy to use criminal law when it believes certain behavior is disruptive to social cohesion. However, this approach still faces significant challenges. First, public morality is not always homogeneous. Second, it is difficult to determine objective indicators of when a behavior truly threatens social order. Third, there is the risk of expanding criminal law without clear boundaries.

In contrast to the previous model, a number of countries have chosen to limit the use of criminal law to behavior deemed to fall within the private sphere. This approach developed from the influence of the harm principle and the theory of limited state intervention. In this model, criminal law is positioned as an instrument of protection against real harm, rather than as a tool to standardize morality. Theoretically, this approach is based on several assumptions:

a. criminal law should be used in a limited manner;
b. the state may not expand criminal law without a clear legal interest;

c. moral protection is not always identical to legal protection;
d. individual freedom can only be limited proportionally.

This model has gained support in the development of modern criminal law because it is considered more consistent with the principles of the rule of law and the limitations of state power. However, this approach is not without criticism. Limiting state intervention too narrowly has the potential to ignore the social and cultural dimensions that exist within society. Comparisons between countries show that there is no single model for the use of criminal law in addressing homosexual behavior. These differences demonstrate that criminalization is not an automatic consequence of religious values or the development of rights. Rather, criminalization is the result of a political-legal process that determines what values are deemed worthy of protection; who is protected; the extent to which the state may use criminal law; and whether criminal instruments are effective. These findings demonstrate that the presence or absence of criminalization cannot be the sole indicator for assessing the quality of a legal system. More importantly, is whether the policy is formulated through legitimate, rational, and accountable mechanisms.

In the Indonesian context, comparative law results indicate that the formation of criminal law cannot be achieved by copying other countries' models. The character of Indonesia's rule of law is built on Pancasila, the constitution, social plurality, and respect for religious values and the public interest. Therefore, when the state considers developing criminal policy in the future, several parameters must be met. First, criminalization must demonstrate a protected legal interest. Second, the state must demonstrate that the use of criminal law is a necessary means. Third, the establishment of norms must comply with the principle of legality. Fourth, criminalization must be proportionate to the restriction of rights. Fifth, criminal policy must be effective and not result in overcriminalization.

This approach demonstrates that Indonesian criminal law policy need not necessarily choose between a moralistic and a liberal model. More importantly, it ensures that the use of criminal law remains within the framework of the rule of law. Based on a comparative analysis, this study argues that the debate over the criminalization of homosexual behavior in Indonesia cannot be resolved by directly referring to the practices of other countries. Each country has its own distinct construction of legal legitimacy.

For Indonesia, the direction of criminal law policy should not be determined solely by global pressures or moral preferences, but rather through an evaluation of the legal interests to be protected, the effectiveness of criminal instruments, and their conformity to the principles of the Indonesian rule of law. Thus, comparative law serves not to determine a model to follow, but as a tool to evaluate the rationality of national criminal law formation.

3.6 Reconstruction of Indonesian Criminal Law Politics Regarding the Regulation of Homosexual Behavior

After examining the theory of criminalization, the principle of legality, the debate between legal moralism and the harm principle, an analysis of Indonesian legal politics, and comparative practices in several countries, in the context of a modern rule of law, criminalization cannot be understood as an automatic response to social change or the moral debates that develop in society. Instead, criminalization is a legal political decision that requires justification that can be tested scientifically and constitutionally. Therefore, the reconstruction of Indonesian criminal law politics must be directed at establishing a rational, limited, and oriented model of criminalization that protects legal interests. One fundamental

problem in the criminalization debate is the tendency to equate moral disapproval with the need for criminalization. However, theoretically, modern criminal law is not designed to regulate all moral dimensions of society.

Barda Nawawi Arief (2011) explains that criminal law is an instrument for protecting society that must be used selectively. Douglas Husak (2008) even warns of the dangers of overcriminalization, namely the excessive use of criminal law on social issues that can actually be addressed through other instruments. In this context, this study argues that the direction of Indonesian legal policy needs to shift from a moral-based criminalization approach to a legal interest-based criminalization approach. The former places moral violations as the primary reason for the use of criminal law. Conversely, the latter requires that criminalization can only be justified if there is a clear legal interest deserving of state protection. Through the legal interest approach, the state does not lose the opportunity to consider religious and moral values, but these values must be translated into legal interests that can be objectively tested.

In a state governed by the rule of law, the formation of criminal law must be limited to prevent it from becoming a means of expanding power. The principle of legality serves as a primary instrument for this limitation. Moeljatno (2008) explains that the principle of legality not only protects legal certainty but also restricts the state from using criminal law arbitrarily. In the context of this research, the principle of legality is crucial. First, the state cannot expand criminal law through interpretation. Second, the formation of criminal norms must be carried out through legislative mechanisms. Third, the use of criminal law must be legally predictable.

The principle of ultimum remedium is a crucial element in the political reconstruction of criminal law. In modern legal developments, criminal law is understood as the most severe instrument available to the state because it implies restrictions on freedom. Muladi (2002) explains that criminal law should not be the primary instrument in resolving all social problems. In the context of this research, the use of criminal law must be preceded by an evaluation of other instruments. The state needs to consider: legal and civic education, social policy, strengthening family and community institutions, administrative legal instruments, and rights protection mechanisms. Based on the overall analysis, this study proposes five parameters for the political reconstruction of Indonesian criminal law.

a. Legal Interest Principle: Every criminalization must clearly demonstrate a protected legal interest.
b. The principle of necessity, the state must prove that the use of criminal sanctions is necessary.
c. Principle of Proportionality: Restrictions on rights must be proportionate to the objectives of legal protection.
d. The principle of democratic legitimacy, the formation of norms is carried out through legislation.
e. Ultimum Remedium Principle, Criminal sanctions are used after other instruments are ineffective.

Based on the overall discussion, this study argues that the political direction of Indonesian criminal law regarding the regulation of homosexual behavior should not be constructed through a simple dichotomy between criminalization and non-criminalization. The primary issue lies not in the presence or absence of criminal norms, but rather in whether the state has sufficient justification to use criminal instruments. In a state based on the rule of law (Pancasila), religious and moral values remain important sources of legal formation. However, these values cannot automatically serve as the basis for criminalization.

Criminalization must remain limited by the principles of legality, protection of legal interests, proportionality, and the function of criminal law as an ultimum remedium. Therefore, the political reconstruction of Indonesian criminal law is directed toward the formation of policies that are constitutional, rational, and capable of maintaining a balance between protecting social values and limiting the use of state power.

4. Conclusion

Based on the research findings, it can be concluded that the legal policy of criminalizing homosexual behavior in Indonesian criminal law cannot be formed solely based on moral judgment, but must be based on the principles of the rule of law, legality, protection of legal interests, proportionality, and the use of criminal law as an ultimum remedium. In this context, the primary issue is not sexual orientation as an identity, but rather the limits of state authority in using criminal instruments against certain behaviors.

This study finds that the absence of general criminalization of homosexual behavior in Indonesian criminal law does not automatically indicate a normative vacuum, but rather can be understood as a form of open legal policy within the authority of lawmakers. The debate between legal moralism and the harm principle demonstrates that public morality can be a consideration in legal formation, but cannot automatically become the basis for criminalization without a clear legal interest and a need for proportional protection.

An analysis of Constitutional Court Decision No. 46/PUU-XIV/2016 confirms that the expansion of criminalization space is the authority of the legislator and cannot be formed through judicial interpretation. In addition, the results of legal comparisons show that criminalization policies in various countries are strongly influenced by their respective constitutional identities and legal politics so that they cannot be directly adopted into the Indonesian legal system. Therefore, the future direction of Indonesian criminal law policy needs to be built through a legal interest-based criminalization approach, namely a criminalization model that places the protection of legal interests, democratic legitimacy, limitations on the use of punishment, and a balance between social values and the principles of the rule of law as the main basis for the formation of national criminal law.

References

Journal Articles

Legrand, P. (1997). The Impossibility of Legal Transplants. Maastricht Journal of European and Comparative Law, 4(2), 111–124.

Elvira Agustina, & Taun. (2023). The Limits of Homosexual Acts in Criminal Law and Human Rights in Indonesia. Wahana Pendidikan Scientific Journal, 9(21), 256–269.

Prima, K., Usman, U., & Liyus, H. (2021). Regulation of Homosexuality in Indonesian Criminal Law. PAMPAS: Journal of Criminal Law, 1(3), 92–105. https://doi.org/10.22437/pampas.v1i3.11099

Sholihin, R., Rahma, R., & Zubaidi, Z. (2023). Criminalization of Homosexuality as a Criminal Act. Tasyri': Journal of Islamic Law, 2(1), 69–94. https://doi.org/10.53038/tsyr.v2i1.46

Zul Khaidir Kadir. (2025). Unlimited Criminalization: Analyzing the Abuse of Power in Modern Criminal Law Codification Legislation. Presidensial: Journal of Law, State Administration, and Public Policy, 2(2), 01–18. https://doi.org/10.62383/presidential.v2i2.665.

Books and Book Chapters

Husak, D. (2008). Overcriminalization: The Limits of the Criminal Law. Oxford University Press.

Devlin, P. (1965). The Enforcement of Morals. Oxford University Press.

Hart, H.L.A. (1963). Law, Liberty and Morality.

Mill, J.S. (1859). On Liberty.

Feinberg, J. (1984–1988). The Moral Limits of the Criminal Law.

Barda Nawawi Arief. (2011). Anthology of Criminal Law Policy.

Mochtar Kusumaatmadja. (2006). Legal Concepts in Development.

Satjipto Rahardjo. (2009). Progressive Law.

Douglas Husak (various articles on criminalization).

John C. Mubangizi (2024/2025), on the human rights implications of the criminalization of same-sex relations in Africa.

ILGA World. (2024). Laws on Us Report.

Arief, BN (2011). Anthology of Criminal Law Policy. Kencana.

Husak, D. (2008). Overcriminalization: The Limits of Criminal Law. Oxford University Press.

Kelsen, H. (1967). Pure Theory of Law. University of California Press.

Mahfud MD. (2012). Legal Politics in Indonesia. Rajawali Pers.

Muladi. (2002). Democratization, Human Rights and Legal Reform in Indonesia. Habibie Center.

Arief, BN (2011). Anthology of Criminal Law Policy. Kencana.

Kelsen, H. (1967). Pure Theory of Law. University of California Press.

Moeljatno. (2008). Principles of Criminal Law. Rineka Cipta.

Husak, D. (2008). Overcriminalization: The Limits of Criminal Law. Oxford University Press.

Devlin, P. (1965). The Enforcement of Morals. Oxford University Press.

Hart, H.L.A. (1963). Law, Liberty and Morality. Oxford University Press.

Mill, J. S. (1859). OnLiberty. John W. Parker and Son.

Moeljatno. (2008). Principles of Criminal Law. Rineka Cipta.

Montesquieu. (1989). The Spirit of Laws. Cambridge University Press.

Devlin, P. (1965). The Enforcement of Morals. Oxford University Press.

Watson, A. (1993). Legal Transplants: An Approach to Comparative Law. University of Georgia Press.

Arief, BN (2011). Anthology of Criminal Law Policy. Kencana.

Husak, D. (2008). Overcriminalization: The Limits of Criminal Law. Oxford University Press.

Moeljatno. (2008). Principles of Criminal Law. Rineka Cipta.

Muladi. (2002). Democratization, Human Rights and Legal Reform in Indonesia. Habibie Center.

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Criminal Code No. 1 of 2023

Constitutional Court of the Republic of Indonesia. (2017). Decision Number 46/PUU-XIV/2016.