

LEGAL POLITICS OF THE BAN ON SAME-SEX MARRIAGE IN INDONESIA FROM A HUMAN RIGHTS PERSPECTIVE

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INTRODUCTION

Legal policy is closely related to human rights (hereinafter referred to as HAM). Legal policy is the state's policy to create and enforce laws on human rights. Human rights are the fundamental rights inherent to every individual that require legal protection. A progressive and responsive legal policy is crucial for creating an effective legal system that protects human rights, addresses past violations, and prevents future violations.

Legal policy is a policy or strategy for realizing state goals through the creation, implementation, and enforcement of laws. Legal policy determines the direction, form, and content of laws, making them a tool for

achieving social goals and national ideals.

The purpose of establishing the Unitary State of the Republic of Indonesia is to protect all Indonesian people and all Indonesian territory, advance general welfare, improve the life of the nation, and participate in implementing world order based on independence, eternal peace, and social justice. ¹

The rights of Indonesian citizens are regulated in the 1945 Constitution of the Republic of Indonesia (UUD 1945), specifically in articles 27 to 34. These rights cover various aspects of life, including the right to work and a decent living, ²the right to life, ³the right to collective self-development, ⁴the right to legal protection, ⁵the right to religious freedom, ⁶the right to education, ⁷and other rights such as the right to

¹ Pembukaan Undang-Undang Dasar 1945, alinea keempat.

² Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, pasal 27 ayat (2)

³ *Ibid*, Pasal 28A

⁴ *Ibid*, Pasal 28C ayat (2)

⁵ *Ibid*, Pasal 28D ayat (1)

⁶ *Ibid*, Pasal 28E ayat (1) dan pasal 29 ayat (2)

⁷ *Ibid*, Pasal 31

participate in government, the right to vote and be elected in general elections, and the right to social security.

In addition to the 1945 Constitution mentioned above, there is also a law that explicitly regulates the rights of Indonesian citizens, namely Law Number 39 of 1999 concerning Human Rights . This law regulates the right to life, the right to have a family and continue the lineage, the right to develop oneself, the right to obtain justice, the right to personal freedom, the right to a sense of security, the right to welfare, the right to participate in government, the rights of women, the rights of children, and others.

In Indonesia, one of the issues often associated with human rights is the ban on same-sex marriage. This is due to differing views and controversies regarding the individual right to form a family, which clashes with religious and cultural norms and positive law in Indonesia, which does not recognize same-sex marriage. Although there are arguments that the right to form a family is part of human rights, Indonesian law, based on religious and cultural values, firmly rejects same-sex marriage.

Same-sex marriage, which in English is called *same sex marriage*, is

marriage between two people of the same ⁸sex or gender , same-sex marriage is also known as gay marriage. In Indonesia, although same-sex marriage is prohibited, this case has occurred, such as in 2017 in Jember, carried out by the couple MF (21 years old), and AA (23 years old), who married on July 19, 2017, according to Muhammad Erfan (Head of the Ajung District Religious Affairs Office), his party was deceived because there was nothing strange about MF and AA. The party who played the role of the prospective wife wore a hijab and wore closed clothes. Her voice also sounded like a woman.⁹

A similar incident occurred in mid-2020, with the public shocked by a same-sex marriage in West Nusa Tenggara. This case allegedly stemmed from a ruse by Mita, also known as Supriyadi, who posed as a woman to Muhlisin bin Kalamullah, who was unaware that his wife was a man. The marriage between Mita, also known as Supriyadi, and Muhlisin took place on June 2, 2020. The Mataram District Attorney's Office filed for annulment of the same-sex marriage at the Giri Menang Religious Court in West Lombok, with case register No. 540/Pdt.G/2020/PA/GM.¹⁰

⁸https://id.wikipedia.org/wiki/Perkawinan_sejenis_, accessed May 12, 2025.

⁹<https://www.tempo.co/gayahidup/kisah-kisah-penipuan-pernikahan-sejenis-di-indonesia-1154916> , accessed May 12, 2025

¹⁰<https://news.detik.com/berita/d-5056729/heboh-istri-ternyata-pria-di-ntb-jaksa-ajukan-pembatalan-pernikahan-/1>, June 17, 2020. Accessed June 10, 2025

Marriage law in Indonesia does not explicitly prohibit same-sex marriage, the prohibition on marriage based on Law Number 1 of 1974 concerning Marriage is as follows: "Marriage is prohibited between two people who:

1. Blood related in a straight downward or upward lineage;
2. Being related by blood in the side bloodline, that is between brothers, between one person and one's parent's brother and between one person and one's grandmother's brother;
3. In a relationship, i.e. parents-in-law, step-son-in-law and step-mother/father;
4. Related to nursing, namely nursing parents, nursing children, nursing siblings and nursing aunts/uncles;
5. Being related as a sibling to the wife or as an aunt or niece of the wife, in the case of a husband having more than one wife;
6. Having a relationship that, according to religion or other applicable regulations, prohibits marriage.¹¹

Although Article 8 of the Marriage Law above does not include a prohibition on same-sex marriage, this

law explains the definition of marriage as: " a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the One Almighty God" ,¹²from this explanation it can be concluded that a marriage relationship between a man and a man or a woman and a woman is not a legal marriage according to the Marriage Law. Therefore, marriage between those of the same sex is still taboo in social life.¹³

In Indonesia, same-sex marriage is considered contrary to legal, religious, moral, ethical, and cultural norms.¹⁴Therefore, to date, same-sex marriages are not legally recognized in Indonesia. The primary impact of the non-recognition of same-sex marriages in Indonesia is the lack of legal guarantees as legitimate couples under Indonesian law. This means that same-sex couples do not have the same legal rights as heterosexual couples.

Although the Indonesian Marriage Law states that marriage can only be between a man and a woman, some argue that establishing a family is a human right and should not be

¹¹Undang-undang Nomor 1 Tahun 1974 tentang Perkawinan, Pasal 8

¹² *Ibid* , Pasal 1

¹³Akhmad Budi Cahyono dan Surini Ahlan Sjarif, *Mengenal Hukum Perdata*, (Jakarta: CV. Gitama Jaya, 2008), h. 43

¹⁴ Grivia Eman, dkk., *Tinjauan Hukum terhadap Fenomena Perkawinan Sejenis yang Dilakukan di Luar Negeri dan Dampaknya dalam Hukum Perkawinan di Indonesia*, <https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/download/58935/47982/146580>. Diakses pada tanggal 3 Agustus 2025

restricted by gender. This view is supported by international developments, with a growing number of countries recognizing and even legalizing same-sex marriage.¹⁵

The prohibition of same-sex marriage is still considered as the right norm in Indonesia to portray the image of a civilized nation and uphold divine values, but along with the changing international views on people who like same-sex coupled with international pressure for the enforcement of human rights, it is not impossible that one day legal politics in Indonesia will change towards the recognition of same-sex marriage or perhaps remain conservative by strengthening the law prohibiting same-sex marriage, therefore this research is important to find a clearer legal basis, reduce the potential for debate, and help future legal policy makers to formulate laws that are in accordance with national values while still respecting human rights.

The topic of same-sex marriage is not new in the world of research and there have been several previous studies that have examined this sensitive issue, as follows:

¹⁵ Rani Nuraeni, et.al., *Pernikahan Sesama Jenis: Tinjauan Hak dan Kewajiban Berdasarkan Undang-Undang Perkawinan*, Jurnal Syntax Admiration, p-ISSN 2722-7782, e-ISSN 2722- 5356 Vol. 5, No. 10, Oktober 2024, h. 4208

¹⁶ Aisyah Nurjannah, Amalia Putri Chamila, dkk. *Penentangan Legalisasi Adanya Perkawinan Sesama Jenis dengan Menegakkan*

1. Aisyah Nurjannah, Amalia Putri Chamila, et al. (Journal), title: "Opposition to the Legalization of Same-Sex Marriage by Upholding the Principles of Human Rights", 2023. This study concluded that same-sex marriage does not meet the requirements to be considered a human right because it is not universal, that is, it has not been recognized, accepted, and respected by all countries, especially Indonesia.¹⁶
2. Difa Fibra Aisyah and Muhammad Teguh Syuhada (Journal), Title: "Same-Sex Marriage: Indonesian and Thai Legal Perspectives" in 2023. The results of this study indicate that Thailand tends to be progressive in recognizing LGBT rights, this is the first step in legal protection legislation for same-sex couples in this country including the Draft Law on "Civil Partnership". In contrast, Indonesia, which is more conservative with a strong legal and cultural background does not yet have a legal framework that supports the legalization of same-sex marriage.¹⁷

Prinsip Hak Asasi Manusia, Jurnal Indigenous Knowledge, Volume 2 Number 2 December 2023: E-ISSN: 2746-3662

¹⁷ Difa Fibra Aisyah dan Muhammad Teguh Syuhada, *Perkawinan Sesama Jenis Perspektif Hukum Indonesia dan Hukum Thailand*, Jurnal Hukum Lex Generalis. Vol.4. No.6 (2023)

3. Fanny Priscyllia (journal), title: "Same-Sex Marriage in Natural Law in Indonesia" 2022. The results of this study indicate that the Republic of Indonesia Law Number 1 of 1974 concerning Marriage does not recognize the existence of same-sex marriage even in customary law and religious law recognized in Indonesia. Same-sex marriage is contrary to the values and teachings of God and is not in accordance with human nature which was created in pairs to form a happy and eternal family consisting of a father, mother and child in order to ensure the continuity of humanity in the world based on the One Almighty God.¹⁸

Based on the aforementioned research, the author concludes that no previous research has examined the legal policy of the same-sex marriage ban in Indonesia from a human rights perspective. What distinguishes this study is:

1. This is done by using several approaches, namely normative and conceptual approaches to objects that are generally dominated by normative research, thus producing a more comprehensive legal analysis.
2. Paying attention to the political aspects of law so that it is not just analyzing legal norms alone.

The objectives of this research are:

1. Analyze the political, social, and legal factors that influence legal policy in regulating marriage in Indonesia.
2. Reviewing and analyzing the ban on same-sex marriage from a human rights perspective, and identifying potential human rights violations that result from it.

FORMULATION OF THE PROBLEM

The problem formulation that will be studied in this research is:

1. How does legal policy in Indonesia shape, enforce, and maintain legal norms that prohibit same-sex marriage?
2. How does the law prohibiting same-sex marriage in Indonesia conflict with the principles of human rights, particularly the right to equality, non-discrimination, and the right to marry and form a family?

RESEARCH METHODS

This research is a normative legal research *which* is descriptive-analytical in nature using several approaches as follows:

1. Statute Approach *by* analyzing relevant laws and regulations, such as the 1945 Constitution, Marriage Law, Human Rights Law, and other related regulations.
2. The Conceptual Approach uses

¹⁸ Fanny Priscyllia, *Perkawinan Sejenis dalam Hukum Kodrat di Indonesia*, Jurnal Jatiswara, Vol. 37 No. 2 Juli 2022.

relevant legal concepts and doctrines such as human rights, discrimination, legal politics, and constitutional rights.

3. Historical approach, namely by analyzing the process of formation and substance of Law Number 1 of 1974 concerning Marriage, tracing the development and enforcement of human rights in Indonesia, and analyzing Law Number 39 of 1999 concerning Human Rights.

The data sources used include primary legal materials (laws, court decisions), secondary legal materials (books, scientific journals, dissertations), and tertiary legal materials (legal dictionaries and encyclopedias).

RESEARCH RESULTS AND DISCUSSION

A. Legal Politics in Forming the Law Prohibiting Same-Sex Marriage in Indonesia

Legal policy is a crucial aspect in shaping national law in an effort to achieve state goals. Legal policy plays a role in determining the direction of the applicable law, whether to create new laws, amend existing ones, or repeal old ones.

The formation of law (*rechtsvorming*) and the discovery of law (*rechtsvinding*) cannot be separated from the existence of legal politics.¹⁹ In legal studies, legal politics is often termed *the politics of law*, *legal policy*, *politics of legislation*, *politics of legal products*, and *politics of legal development*.²⁰

Padmo Wahyono stated that legal policy is a basic policy that determines the direction, form and content of the law that will be formed, implemented and confirmed, and policies related to the law that will be enforced in the future.²¹

In the context of the ban on same-sex marriage in Indonesia, to find the legal policy that caused the ban, this can be done by tracing the history of the formation of the law, analyzing the legal substance, and examining the legal political factors that influence it.

1. History of Marriage Law in Indonesia

Marriage law in Indonesia has a long history, experiencing ups and downs along with the legal policies of each period of power and

¹⁹ Imam Syaukani dan A. Ahsin Thohari, *Dasar-Dasar Politik Hukum* (Jakarta: Rajawali Pers, 2013). h. 42.

²⁰ Ibnu Elmi A.S. Pelu, *Gagasan, Tatanan & Penerapan Ekonomi Syari'ah dalam*

Perspektif Politik Hukum (Malang: Setara Press, 2008), h. 7.

²¹ *Ibid*, h. 8

also influenced by colonial policies.

²²Historically, marriage law based on Islamic law experienced its heyday during the era of the Islamic kingdoms in the archipelago. Therefore, before the colonial era, Islamic marriage law was already practiced and used as a reference to resolve problems within Muslim communities. Similarly, customary law was adhered to and upheld by communities within their own communities.

Before Indonesia's independence (before 1945), there was no single regulation in the form of a book or law that uniformly governed marriage law. Marriage law applied based on ethnic and religious classifications.

For Europeans living in the archipelago, marriage law is regulated by *the Burgerlijk Wetboek* (BW) or Civil Code (KUH Perdata). For indigenous Indonesians who are Muslim, marriage law is regulated by Islamic law, enforced by the Religious Courts (*Landraad*) with reference to classical fiqh books, generally from the Shafi'i school of thought.

As for indigenous Christian communities, marriage laws are regulated in the Indonesian Christian Marriage Ordinance (*Huwelijk*

Ordonnantie Christen Inlanders or HOCI) which was established in 1933 (S. 1933 No. 74).

Meanwhile, for the East Asian population originating from China, Arabia and India, they are generally subject to their respective customary laws or religious laws.

In the early colonial period, the Dutch government chose to reconcile with the people of Indonesia by recognizing the laws that existed in society. As the theory put forward by Van Den Berg (1845-1927) that the law that applies to the people of the Dutch East Indies (present-day Indonesia) is the law of each religion; Islamic law for Muslims and Hindu law for Hindus. Customary law is only accepted if it does not conflict with religious law, this theory later became known as the *Receptio in Complexu theory*.

The Receptio in Complexu theory was later refuted by Snouck Hurgronje (1857-1936), who put forward *the Receptie Theory*, stating that customary law essentially applies to indigenous Indonesians. Islamic law only applies to a community if it has been accepted by the community as customary law.

Politically, this theory was used by Snouck Hurgronje to weaken Islamic teachings within

²² Yaswirman, *Hukum Keluarga; Karakteristik dan Prospek Doktrin Islam dan Adat dalam Masyarakat Matrilineal*

Minangkabau (Jakarta: Rajawali Pers, 2013), h. 1

society. This is because those who hold strong Islamic beliefs generally find it difficult to accept Western civilization. The impact of this theory's application was that marriage laws, which were originally strongly influenced by Islam, began to become intertwined with societal customs.

The formation of marriage law based on Islamic law was strengthened again when it was echoed again by the Investigating Committee for the Preparation of Indonesian Independence (BPUPKI) where Islamic leaders fought for the re-implementation of Islamic law with the power of Islamic law itself without any connection with customary law.²³

After Indonesia's independence, Law Number 22 of 1946 concerning the registration of marriages, divorces and reconciliation was enacted, which was applicable outside Java and Madura. Initially, this law was limited to the territory of Indonesia until its reach was expanded nationally through Law Number 32 of 1954. regarding the enactment of the Law of the Republic of Indonesia, the purpose of establishing this Law is to establish

uniform regulations throughout Indonesia, because previously there were various regulations in force in various regions.

As society developed, the implementation of Law Number 22 of 1946 was seen as unable to provide adequate legal protection for women and children, this prompted several women's organizations at that time to demand a marriage law that was able to protect their rights and this issue was discussed in the Volksraad.²⁴

At the end of 1950, the Investigating Committee for Marriage Regulations and Laws, Divorce and Reconciliation was formed, chaired by Mr. Teuku Moh. Hasan. This committee was formed based on the decree of the Minister of Religious Affairs of the Republic of Indonesia number B/4299 dated October 1, 1950. However, the committee that had been formed could not carry out its duties as expected, so on April 1, 1961, a new committee was formed, with the aim of being able to work effectively and produce results as expected.²⁵

After undergoing numerous changes and receiving suggestions from the working committee, on December 22, 1973, the government

²³ Harry J. Benda, *The Crescent and The Rising Sun : Indonesian Islam Under The Japanese Accupation 1942-1945* (Bandung : W. Van Hoeve, 1958), h. 89

²⁴ Abdul Manan, *Aneka Masalah Hukum Perdata di Indonesia* (Jakarta: Kencana, 2000), h. 3

²⁵ *Ibid*, h. 4

submitted the Marriage Bill, which was then forwarded to a plenary session of the Indonesian House of Representatives (DPR-RI) for subsequent ratification as law. In the plenary session, the factions expressed various opinions, followed by a closing speech by the Minister of Religious Affairs, representing the government. On January 2, 1974, Law Number 1 of 1974 concerning Marriage was enacted, supplemented by State Gazette (LN) Number 3019/1974.²⁶

2. The Concept of Marriage Law in Indonesia

Marriage law in Indonesia is regulated by Law Number 1 of 1974 concerning Marriage, which is based on the principle of the One Almighty God. This law defines marriage as a physical and spiritual bond between a man and a woman to form a happy and eternal family. It must be carried out according to the laws of each religion and officially registered. The primary principle is monogamy, although polygamy is possible under certain conditions.

In 2019, changes were made to Law Number 1 of 1974, through Law Number 16 of 2019 concerning

Amendments to Law Number 1 of 1974 concerning Marriage, the main change to this Marriage Law is the minimum age limit for marriage to 19 years for men and women, for those who have not reached the age of 19 years must apply for a marriage dispensation to the Religious Court by including urgent reasons.

This change to the marriage law is also a follow-up to the Constitutional Court's decision to reduce the number of child marriages.

The main concepts of marriage law in Indonesia are as follows:

- a. Goal: Forming a happy and eternal family based on the belief in Almighty God.²⁷
- b. Based on religion: A marriage is considered valid if it is carried out according to the religious laws and beliefs of each party.²⁸
- c. The principle of monogamy: A man may only have one wife, and a woman may only have one husband. However, it is still possible for a husband to practice polygamy under strict conditions, hence the principle of open monogamy.²⁹

²⁶ *Ibid*

²⁷ Undang-undang Nomor 1 Tahun 1974, *op.cit.*, pasal 1

²⁸ *Ibid*, pasal 2 ayat (1)

²⁹ *Ibid*, pasal 3 ayat (1) dan (2)

- d. Registration: Every marriage must be registered by the authorized official, namely at the Office of Religious Affairs for Muslims and at the Civil Registry Office for other religions.³⁰
 - e. Minimum age: Prospective husband and wife must be at least 19 years old, or with a marriage dispensation.³¹
3. Political and Legal Factors that Shape the Law Prohibiting Same-Sex Marriage

a. Political Factors

The political process of drafting Law No. 1 of 1974 concerning Marriage began when the president submitted a letter and an attached bill to the House of Representatives (DPR). The government then provided a statement delivered by Minister of Justice Oemar Senoadji and Minister of Religious Affairs Mukti Ali, representing the president.³²

The next stage was a meeting at the House of Representatives (DPR), with speeches by members, each given equal time to express

their opinions and views. Four factions delivered speeches: the United Development Party (PDI), the Karya Party (KPK), and the ABRI (Indonesian Armed Forces).³³

The third stage is a meeting between the House of Representatives (DPR) commissions and the government, represented by the Minister. This is where the bill is processed. The opinions of the DPR and the Minister must be in sync, as otherwise it could take days to reach a consensus. The final stage is a plenary session of the DPR to ratify the law. Once mutually agreed upon, the session concludes, and the draft bill is submitted to the president for signature and enactment.³⁴

The process of ratifying the Marriage Law was not easy, there were many debates and differences of opinion as well as input from members of the DPR, political elites and the public.

As in 1967, the Draft Marriage Law was rejected by the Catholic faction. The reason for his refusal was because he did not want to discuss matters related to religion. Then there is also a debate that raises

³⁰ *Ibid*, pasal 2 ayat (2)

³¹ Undang-undang Nomor 16 Tahun 2019 tentang Perubahan atas Undang-undang Nomor 1 Tahun 1974 tentang Perkawinan, Pasal 7 ayat (1) dan (2)

³² Amak FZ, *Proses Undang-Undang Perkawinan* (Bandung: Al-Ma'arif, 1976), h. 9

³³ Maulida Zahra Kamila, *Politik Hukum Undang-Undang Perkawinan di Indonesia*, Jurnal Hukum Keluarga dan Peradilan Islam Vol. 3, No. 2 (2022), pp. 207-220, doi: 10.15575/as.v3i2.13542, h. 211

³⁴ *Ibid*

the issue of polygamy and women's rights so that they receive more attention and protection.³⁵

Then on July 31, 1973, there was a rejection by the United Development faction because there were several articles that were considered not in accordance with Islamic teachings, namely articles on the requirements for the validity of marriages that were not based on Islam, the status of adopted children who were equal to biological children, the prohibition of marriages due to the relationship between adopted children or adoptive fathers, and the permissibility of marriage for people of different religions.

The United Development Faction proposed a revision to the Marriage Bill which then received support from Islamic organizations such as IPNU, PII, GMII and Islamic scholars. Following this proposed revision, the DPR then demanded that the government revoke the Marriage Bill which was contrary to Islamic religious rules.

After several meetings, finally all articles that were considered to be in conflict with Islamic law were changed so that they were no longer in conflict.

Based on the explanation of the process of forming the Marriage Law in Indonesia, it can be seen that

Law Number 1 of 1974 was formed with various political interests in mind, namely:

1) State Interests

The state has an interest in immediately establishing uniform marriage laws throughout Indonesia to achieve legal certainty and unity. It also aims to promote a harmonious and prosperous family order in Indonesia. This law recognizes the validity of marriages conducted according to each religion and belief, but also emphasizes the importance of marriage registration as part of state administration.

2) The Interests of Religious Communities

Muslims, as the majority religion, are very *active* in campaigning for the marriage law to be in line with Islamic law. This is done through political parties in parliament and also by Islamic mass organization figures through lobbying with the government.

3) The Interests of Women and Children

A prominent issue during the drafting of the marriage law was the rights of women and children. Female figures at the time consistently advocated for women and children to receive

³⁵ *Ibid*, h. 213

adequate legal protection from the state in their married lives.

Thus, the issue of same-sex marriage has not been a major issue considered when forming marriage laws in Indonesia (in the period 1950-1974), this is understandable because if seen from its history, before 1975 no country in the world explicitly legalized same-sex marriage, because at that time the world viewed that people who liked the same sex were included as people with sexual disorders. This view began to change in 1975, when psychologists who were members of *the American Psychological Association* removed the behavior of being gay from the classification of mental disorders, where previously this behavior was categorized as paraphilia (unnatural sexual behavior), so that according to them people who like the same sex cannot be said to be people with mental disorders. Furthermore, in 1993, *the World Health Organization* (WHO) also removed homosexuality from the classification of diseases and stated that homosexuality cannot be considered a pathological condition, disorder, or disease because research shows that sexual

orientation is an intrinsic part of human characteristics.³⁶

The WHO's removal of the "disease" status for same-sex behavior was one of the reasons countries around the world legalized same-sex marriage, such as Norway (1993), the Netherlands (1996), and Belgium (2003).³⁷ Since then, the issue of same-sex marriage has emerged as an international issue, often linked to human rights.

b. Legal Factors

Pancasila, as the foundation of the state and the nation's outlook on life, is a source of values and a philosophical foundation in the formulation of national legal policies, including marriage law which is based on Law Number 1 of 1974.

The ideological basis of this marriage law is Pancasila and the 1945 Constitution of the Republic of Indonesia. The values of Pancasila are reflected in the articles in the Marriage Law, including the following:

- 1) Belief in the One Almighty God, this principle is depicted in Article 1 of Law Number 1 of 1974 concerning marriage, where marriage is defined as a physical

³⁶ Eko Hero, *Kaum Homoseksual di Indonesia; Sebuah Pergulatan Komunikasi Sosial, Budaya dan ideologi* (Depok: Penerbit Karya Bakti Makmur Indonesia, 2024), h. 52

³⁷ *Ibid*

and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on Belief in the One Almighty God. This is also emphasized in Article 2 paragraph (1) which states that a marriage is valid if it is carried out according to the laws of each religion and belief.

- 2) Justice, equality, and humanity, these values are the foundation for the renewal of marriage law as stipulated in Law Number 16 of 2019, such as in determining the age limit for marriage to guarantee children's rights and prevent underage marriage.
- 3) Unity, as previously presented, one of the aims of establishing marriage laws is to create legal unity for all Indonesian people, overcoming the diversity of existing customary and religious marriage laws.

The divine principle that animates marriage law is also in line with the 1945 Constitution, especially article 29 paragraphs (1) and (2).

Marriage law in Indonesia is based on divinity, with the majority of the population being Muslim, which is certainly the background that makes it difficult for marriage law in Indonesia to recognize same-sex marriage because Islamic

teachings firmly reject same-sex sexual attraction as Allah says in the letter Asy-Syu'ara verses 165-168:³⁸

اتَّاتُوا الذُّكْرَانَ مِنَ الْعَالَمِينَ لَا تَذَرُوا مَا
خَلَقَ لَكُمْ رَبُّكُمْ مِنْ أَرْوَاحِكُمْ بَلْ أَنْتُمْ قَوْمٌ
عَادُونَ قَالُوا لَنْ لَمْ تَنْتَهَ بِالْوَطْ لَتَكُونَنَّ مِنَ
الْمُخْرَجِينَ قَالَ إِنِّي لِعَمَلِكُمْ مِنَ الْقَالِينَ ۝

c. Social Factors

Sociologically, marriage is seen as an important social institution that forms the family, the smallest unit of society. Indonesian marriage law aims to create a happy and lasting family. based on the belief in Almighty God, which shows the influence of social and moral values that apply in society.

The existence of social movements that accompanied the formation of marriage laws, especially from women's organizations, which demanded guarantees for women's rights in the household, including restrictions on arbitrary polygamy and guarantees of a more equal position for wives before the law, which were then accommodated in the law, shows that social factors also influence the formation of marriage laws in Indonesia.

Furthermore, the development of Islamic legal thought following the enactment of Law No. 1 of 1974 has also

³⁸ Departemen Agama RI, *al-Qur'an dan Terjemahannya*, (Jakarta: Yayasan

Penyelenggara Penterjemah/pentafsir al-Qur'an, 1971), h. 585

strengthened the implementation of Islamic-influenced marriage law in Indonesia. Sayuti Thalib stated that Islamic law applies to marriage and inheritance laws for Muslims. This aligns with their beliefs, legal ideals, and moral ideals.³⁹

Sayuti Thalib's thoughts are still held by Islamic figures today, that for family law of people who are Muslim, Islamic law applies.

B. The Ban on Same-Sex Marriage in Indonesia: A Human Rights Perspective

Human rights have existed since the creation of humanity and its subsequent birth. This is because human rights stem from one's status as a human being. The struggle to uphold human rights has received significant attention from various parties around the world because it is related to human existence itself.

Historically, the idea of human rights first emerged in Europe through the thoughts of a 17th-century English philosopher named John Locke. Locke argued that natural rights are *inherent* in every human being—the right to life, liberty, and property—separate from the political recognition

granted to them by the state. These natural rights predate the state. Therefore, it is the state that should recognize and protect these natural rights.⁴⁰

The definition of human rights is stated by several experts as follows:⁴¹

1. According to John Locke, human rights are natural human rights, such as the right to life, the right to liberty, and the right to property.
2. According to Eleanor Roosevelt, human rights are basic rights that humans are born with, which are inherent in their essence as humans.
3. According to Peter R. Baehr, human rights are fundamental rights inherent in every human being that can be used for their development. These rights are absolute and inviolable.
4. According to Miriam Budiardjo, human rights are rights that humans have acquired and brought with them at birth.

John Locke's theory of *natural rights* was criticized and rejected by utilitarians and positivists, but it regained popularity at the end of World War II. The devastating

³⁹ Sayuti Thalib, *Receptio A Contrario* (Jakarta : Bina Aksara, 1980), h. 65

⁴⁰ Nurliah Nurdin dan Astika Ummy Athahira, *HAM, Gender dan Demokrasi; Sebuah Tjauan Teoretis dan Praktis* (Jatinangor: CV Sketsa Media, 2022), h. 5

⁴¹ *Ibid*, h. 5

experience of the Nazi Holocaust galvanized the international community into reviving the theory of natural rights, and this ultimately led to the emergence of the concept of human rights.⁴²

The establishment of the United Nations (UN) in 1945 was a breath of fresh air for those who recognized the importance of protecting fundamental human rights. By establishing the UN, the international community sought to prevent a repeat of the Holocaust in the future. This marked the beginning of the internationalization of the concept of human rights. This was marked by the international community's acceptance of an international human rights legal regime prepared by the UN, later known as the "*International Bill of Human Rights*".⁴³

In Indonesia, one of the problems that is often associated with human rights violations is the ban on same-sex marriage, this is caused by differences of opinion and controversy regarding the individual's right to form a family, which clashes with religious, cultural, and positive legal norms in Indonesia which do not recognize same-sex marriage.

Same-sex marriage is not recognized because there are no positive legal provisions that legalize it, and the applicable marriage law refers to marriage between a man and a woman.

The non-recognition of same-sex marriage in Indonesia has significant legal and social impacts, namely:

1. Same-sex couples do not have the same legal status as heterosexual couples.
2. Same-sex couples do not have the rights that are usually attached to marriage, such as inheritance rights, adoption rights, insurance rights, and pension rights.
3. Same-sex marriages can be legally annulled, and can even be subject to criminal penalties as regulated in Articles 263 and 266 of the Criminal Code (regarding falsification of documents/identity).
4. Same-sex marriage is often considered to deviate from social and religious norms in Indonesia, which can lead to discrimination and stigma against same-sex couples.

The legal implications outlined above are viewed by supporters of same-sex marriage as a

⁴² Peter Davies, *Hak Asasi Manusia: Sebuah Bunga Rampai*, (Jakarta: Yayasan Obor Indonesia, 1994), h. 1

⁴³ Rhona K. M. Smith, *Hukum Hak Asasi Manusia*, (Yogyakarta: PUSHAM UII, 2008), h. 14

violation of human rights, as they consistently advocate for freedom, equality, and non-discrimination. Consequently, Indonesia is often considered inconsistent in upholding human rights by some international human rights activists.

Same-sex marriage, viewed from an international human rights perspective, has generated mixed views. Several countries and international organizations have recognized the rights of same-sex couples as part of the principles of non-discrimination and equality before the law. Organizations such as the United Nations (UN) and various other human rights organizations are encouraging countries to recognize these rights.

The debate about same-sex marriage has given rise to at least three groups of countries in their responses:

1. Countries that support and legalize same-sex marriage;
2. Countries prohibit and criminalize same-sex marriage;
3. Countries that still do not have specific laws regarding same-sex marriage – whether to legalize or prohibit it through criminal law instruments

Indonesia falls into the third category, where Indonesia does not have a specific law regarding same-sex marriage, whether it legalizes or prohibits it.

However, same-sex marriage is not legally recognized in Indonesia based on Marriage Law No. 1 of 1974, Article 1 which states that marriage is a physical and spiritual bond between a man and a woman.

In general, human rights activists have varying views regarding the legalization of same-sex marriage, some support it and some oppose it.

1. The group that supports it views the legalization of same-sex marriage as a form of recognition of human rights, especially the right to equality and non-discrimination, that everyone has the right to choose their life partner regardless of their sexual orientation and that people who choose to marry same-sex partners must have their rights protected without discrimination.
2. Those opposed believe that legalizing same-sex marriage could undermine traditional family values that have been established in each country. Others argue that the right to same-sex marriage is not yet universally accepted in all countries, and therefore, same-sex marriage is not a universally accepted human right.

Refer to original p 16
Universal Declaration of Human Rights or UDHR (*Universal*

Declaration of Human Rights), namely: guaranteeing the right of men and women to marry without discrimination based on nationality, citizenship, or religion, as well as the right to found a family. This article has been interpreted differently by countries around the world.

The above article does not explicitly support same-sex marriage. The essence of the above article is:

1. Regarding gender equality and personal rights, this article strongly emphasizes equality between men and women, not only in the right to marry but also in equal rights during marriage and upon divorce. It affirms the individual's right to make life decisions without discrimination.
2. Freedom to choose a spouse, the assertion that marriage must be based on the free choice and full consent of both spouses, is a key pillar of this article. It rejects any external coercion or interference in choosing a life partner.
3. Family protection, this article also recognizes the family as a natural and fundamental unit in society, and guarantees its protection. from society and the

state. This shows the importance of the family in the social order.

Therefore, in the context of the ban on same-sex marriage, whether this act constitutes a violation of human rights or not depends on the public perception and legal policy of a country.

Let's take the Netherlands, for example, as the first country to legalize same-sex marriage. This was on December 21, 2001.⁴⁴ Before its passage, *the Wet Openstelling Huwelijk* (the official name of the law legalizing same-sex marriage in the Netherlands)⁴⁵ had undergone lengthy debate, but the bill was consistently rejected in parliament.

Politically, 1994 was a pivotal year for the marriage equality movement in the Netherlands. For the first time in eighty years , the Christian Democratic Appeal party , the main opponent of same-sex marriage in parliament, did not hold a majority. Against this backdrop, LGBT-friendly lawmakers had the opportunity to pass a same-sex marriage bill.⁴⁶ The law was ultimately passed.

Based on several references obtained, the factors that influenced

⁴⁴ Zaida Hayati, Soleh Roiful Hadits, dkk, *Pengakuan Perkawinan Sesama Jenis; Komparasi Hukum Perkawinan Belanda dan Indonesia*, Indonesian Journal of Islamic Jurisprudence, Economic and Legal Theory, Vol. 3, Nomor 2 (April-June, 2025), h. 1498

⁴⁵ *Ibid*, h. 1500

⁴⁶ *Ibid*, h. 1499

the Netherlands to become the first country to legalize same-sex marriage include;

1. There is support for the LGBT movement from one of the oldest lesbian and gay organizations in the world, namely *the Center for Culture and Leisure (COC)*.
2. An international survey proved that Dutch society in the 1990s was relatively tolerant of homosexuality and had a moderate level of religiosity.
3. The composition of the government at that time was led by a purple coalition containing secular parties that tended to be open to same-sex marriage.
4. There is a hope to enhance their international reputation for social policy innovation, that they should be the first country to allow same-sex couples to marry.⁴⁷

From a legal and political perspective, the Dutch same-sex marriage bill was only passed after the Christian Democratic Appeal party, which championed Christian democracy, weakened, having previously been the dominant party in parliament. This demonstrates that same-sex marriage is also rejected within the prevailing Christian teachings in the Netherlands.

Other factors include campaigns by the LGBT community, a societal paradigm that is increasingly tolerant in accepting LGBT, and the strengthening of secularism.

In contrast, Indonesia, at least to date, remains a nation with a divine ideology and rejects secularism. This is reflected in the first principle of Pancasila, which is the source of all applicable laws in Indonesia. All laws must align with Pancasila values, including Law No. 1 of 1974, which regulates marriage and serves as the legal basis for the prohibition of same-sex marriage.

Same-sex marriage is rejected in Indonesia for at least the following reasons;

1. Contrary to cultural values in Indonesia which uphold good manners and politeness
2. Contrary to the values of Pancasila, especially the principles of belief in one Almighty God, and just and civilized humanity
3. Contrary to Law No. 1 of 1974 concerning marriage which only recognizes heterosexual marriages
4. The Constitutional Court's view is that same-sex marriage is contrary to the constitution in Indonesia.

⁴⁷ *Ibid* , h. 1501

Regarding human rights enforcement in Indonesia, Maneger Nasution, who served as Commissioner of the National Commission on Human Rights (Komnas HAM) in 2015, stated: " If such a proposal (legalizing same-sex marriage) *ever arises* , *he will firmly reject it. His institution has never discussed the legality of same-sex relationships. Moreover, this behavior is already contrary to the legal basis in Indonesia* . "⁴⁸

The National Commission on Human Rights' efforts in this context are not actually aimed at the legality of marriage itself but rather at healing efforts if the perpetrator of a same-sex relationship is affected by a disease, even though the results of several studies state that someone's attraction to the same sex is normal.

In line with the above commitment of Komnas HAM, human rights figures in Indonesia argue that key human rights documents, such as the Universal Declaration of Human Rights (UDHR), do not explicitly mention same-sex marriage.

The main principle of human rights is non-discrimination, which is interpreted by supporters of same-sex marriage to mean that prohibiting marriage based on

sexual orientation is a form of discrimination, which is contrary to the principle of equality in human rights.

However, the principle of non-discrimination itself is interpreted differently in courts and human rights bodies in various countries and regions. Some courts, such as the Inter-American Court of Human Rights, show a progressive trend in interpreting these rights, while others are more conservative.

In fact, the recognition of same-sex marriage remains largely under the jurisdiction and domestic laws of each country, reflecting the diversity of cultures, religions and social values.

It must be acknowledged that one of the most heated discourses in the last two decades regarding human rights is the conflict between two different ideologies in the application of human rights, namely universality and cultural relativism.⁴⁹

The universality view of human rights sees that human rights are universally applicable, equally applicable everywhere because human rights are inherent in human dignity itself and are derived from natural law theory. In a general perspective, according to cultural relativists, there are no universal

⁴⁸ Republika on Line, July 3, 2015. Accessed May 14, 2025

⁴⁹ Knut D. Asplund, *op., cit* , h. 18.

human rights, and natural law theory ignores the societal basis of individual identity as a human being, because a human being is always a product of several social and cultural environments.⁵⁰

Human rights are necessary for humans to protect their human dignity and serve as a moral foundation for actions and behavior toward other human beings. It's important to note that every human being, in exercising their human rights, must also respect the human rights of others, and they cannot be exercised at their own whim.

Therefore, it is increasingly recognized that every right carries an inherent obligation. Therefore, in implementing human rights, the state, law, government, and other individuals are obligated to observe, respect, and honor human rights and obligations.⁵¹

CONCLUSION

Based on the results and discussion in this study, it is concluded that:

1. Law Number 1 of 1974 concerning Marriage, which is the legal basis for the prohibition of same-sex marriage, was influenced in its

formation by the state ideology based on divinity, Islamic political parties in parliament, and a societal paradigm that is still conservative in responding to the issue of same-sex marriage.

2. The ban on same-sex marriage in Indonesia has the potential for discrimination against same-sex couples by the state and society. However, international human rights instruments themselves do not explicitly state that same-sex marriage is a human right. The principle of freedom to form a family without discrimination, as enshrined in Article 16 of the Universal Declaration of Human Rights, is still interpreted differently by ideology, religion, and culture in each country.

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⁵⁰Satya Arinanto, *Hak Asasi Manusia dalam Transisi Politik di Indonesia*, (Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2015), h. 91.

⁵¹Nurliah Nurdin, *op.,cit.* h. 2

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