



PROHIBITION OF LGBT PRACTICES IN THE ENVIRONMENT OF THE INDONESIAN NATIONAL ARMY INSTITUTION FROM THE PERSPECTIVE OF LEGAL CERTAINTY

Zwastika MAHEDJAJANTA

Universitas 17 Agustus 1945 Surabaya, Indonesia

Slamet SUHARTONO

Universitas 17 Agustus 1945 Surabaya, Indonesia

Yovita Arie MANGESTI

Universitas 17 Agustus 1945 Surabaya, Indonesia

Tomy MICHAEL

Universitas 17 Agustus 1945 Surabaya, Indonesia

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Abstract:

The special task of protecting, maintaining and upholding the sovereignty in country from interference to other countries is carried out by the state security unit called the armed forces, which has now been changed to the Indonesian National Army (TNI). TNI sovereignty security unit has powers that include the land dimension under authority of the Indonesian Army (TNI-AD), the air dimension under Indonesian Air Force (TNI-AU), and the sea dimension under Indonesian Navy (TNI-AL). This research is a normative legal research. The prohibition on LGBT practices based on the TNI Commander's Telegram Letter Number ST/1648/2019 dated October 22, 2019, interpretively emphasizes the prohibition of same-sex sexual relations, and not the existence of LGBT in the TNI institutional environment. This regulation should be carried out through a law whose formation involves parliament as the people's representative, because the prohibition is related to the limitation of human rights, namely sexual relations.

Keywords:

Army; LGBT; Legal certainty

1. Introduction

The special task of protecting, maintaining and upholding the sovereignty in country from interference to other countries is carried out by the state security unit called the armed forces, which has now been changed to the Indonesian National Army (TNI). TNI sovereignty security unit has powers that include the land dimension under authority of the Indonesian Army (TNI-AD), the air dimension under Indonesian Air Force (TNI-AU), and the sea dimension under Indonesian Navy (TNI-AL).

Regarding the function of the TNI as the guardian and enforcer of state sovereignty, it is emphasized in the Republic of Indonesia Law Number 34 of 2004 concerning the Indonesian National Army (UU-TNI), which is formulated as follows: "The Indonesian National Army as a defense tool of the Unitary State of the Republic of Indonesia, is tasked with implementing state defense policies to uphold state sovereignty, maintain territorial integrity, and protect the safety of the nation, carry out military operations for war and military operations other than war, and actively participate in the task of maintaining regional and international peace."

Furthermore, in Government Regulation Number 10 of 2009 concerning the Organizational Structure of the Indonesian National Army, it is stated that: "The Indonesian National Army is the main component that is ready to

be used to carry out national defense tasks". In this regard, the readiness of TNI soldiers is needed in carrying out tasks to defend and uphold the sovereignty of the state.[1]

The requirements to become a TNI soldier are regulated in Article 8 of the TNI Law in conjunction with Article 4 of the Regulation of the Minister of Defense of the Republic of Indonesia Number 27 of 2012 concerning the Administration of the Provision of Voluntary Soldiers for the Indonesian National Army, and Article 7 paragraph (1) of Government Regulation Number 39 of 2010 concerning the Administration of Indonesian National Army Soldiers. If we pay attention to the requirements as stated in these regulations, there are no provisions relating to male or female gender status.[2]

Related to LGBT, in 2019, a Telegram Letter from the Commander of the Indonesian National Armed Forces was issued regarding the prohibition of LGBT practices in the TNI institutional environment. The prohibition was based on important and relevant reasons to be implemented in the TNI institutional environment.[3] The prohibition of LGBT practices was stated in the Telegram Letter from the Commander of the Indonesian National Armed Forces Number ST/1648/2019 dated October 22, 2019, which stated: The Commander's Telegram Letter indicated several things, including not explicitly stating what was prohibited, whether it was about LGBT practices in the institutional environment, in the sense that the prohibited practices were same-sex sexual relations or the presence of people with sexual disorientation in the TNI institutional environment, but the telegram letter stated that LGBT was a criminal act that was subject to criminal sanctions.

2. Research Method

This research is a normative legal research.[4]

3. Results Method and Discussion

3.1. LGBT Practices in the TNI Institutional Environment as a Criminal Act

TNI soldiers, in carrying out their devotion to the nation and state, are required to have high discipline, great responsibility, and good morals. TNI soldiers are also required to be loyal to their duties and obligations above all else. TNI soldiers during their service are instilled with life values as a guide in carrying out their duties and obligations. The norms of guidance for these duties and obligations are in the form of primary rules in the form of state legal norms, as well as behavioral rules in the form of the Soldier's Oath, Sapta Marga, Eight Obligations of the Indonesian National Army and Tri Darma Eka Karma (Tridek), as well as other ethical norms that apply to TNI soldiers.

Primary rules and secondary rules as behavioral rules that serve as guidelines for daily behavior, as well as in carrying out their duties and obligations are expected to be a filter for the behavior of Indonesian National Army Soldiers. To maintain discipline, soldiers are required to be devoted to God Almighty, behave chivalrously, be honest and responsible, and obey the orders of their superiors.[5] These obligations apply to all soldiers regardless of rank, position, and status, these obligations are inherent in every soldier from the lowest rank to the highest rank, because these obligations are general requirements for soldiers.[6]

In the legislation, the requirements to become a TNI soldier do not include a ban on LGBT, but after becoming a soldier, it is prohibited to practice LGBT based on the TNI Commander's Telegram Letter Number ST/1648/2019 dated October 22, 2019. In the telegram, LGBT is defined as an act that is not appropriate for a soldier and is contrary to official orders or acts that are not in accordance with the norms of soldier life based on the TNI Commander's Telegram Letter No. st/398/2009 dated July 22, 2009 in conjunction with Article 53 paragraph (2) letter h of Government Regulation Number 39 of 2010 concerning the Administration of Indonesian National Army Soldiers. In addition, it is also stated that LGBT practices are criminal acts and therefore TNI soldiers who practice LGBT are subject to criminal sanctions in accordance with the Criminal Code.

3.2. Same-Sex Sexual Relations in Criminal Law Perspective

The existence of LGBT in the perspective of criminal law is related to the accompanying actions carried out by the LGBT community, in this case sexual relations between the same sex. In the case of LGBT as a criminal act, in the perspective of criminal law it is sexual behavior carried out by LGBT people.[7] In criminal law, a person's actions in a social perspective are actions that are classified as actions that violate criminal laws and regulations, so they are

categorized as criminal acts. Thus, the LGBT phenomenon is not a criminal act, but what is criminal is sexual relations between the same sex.[8]

Same-sex sexual relations can be categorized as a crime, because it is against the norms of criminal law (KUHP). As a crime, same-sex sexual relations by LGBT people can be categorized as a criminal act or deed or an evil deed. If same-sex sexual relations are categorized as a criminal act or crime, then the perpetrators can be subject to criminal sanctions in accordance with the provisions of applicable laws and regulations. Sexual relations are actually a normal relationship for everyone. However, if the sexual relations are carried out in violation of criminal law norms, then the sexual relations become a crime. In such cases, the sexual act is criminalized as a criminal act.[9]

Same-sex sexual relations carried out by adults, even though they are consensual, are still considered a criminal act, because they do not comply with the norms that apply in society, both legal norms, moral norms, moral norms, and other norms that are alive and maintained by society. However, the use of criminal sanctions against LGBT should not be imposed at the beginning of law enforcement, as long as the LGBT act can still be enforced through sanctions outside of criminal sanctions. Because criminal sanctions cannot immediately have a significant effect on ending the prohibited LGBT acts. However, it can actually result in other detrimental effects on LGBT people who engage in same-sex sexual relations as a criminal act.[10]

Criminalization of LGBT in the new criminal law policy in Indonesia is an effort that must be made by the government to realize an orderly and orderly social system that grows and develops in Indonesia. The criminalization policy against LGBT is not limited to certain acts or crimes, and can be punished, but also includes increasing the severity of criminal sanctions for existing crimes.[11] The National Criminal Code, which is specifically formulated as a basis for adding and expanding Article 292 of the Criminal Code, Article 411 of the Criminal Code, and Article 412 of the National Criminal Code, is still not optimal in efforts to renew criminal law on the social aspects of the Indonesian nation, especially against perpetrators of same-sex sexual relations for adults.

The act of homosexual sexual intercourse causes unrest among the people of Indonesia.[12] Homosexual sexual intercourse is indeed not in accordance with the norms that live and develop in Indonesian society. One of the considerations for criminalizing homosexual sexual intercourse is an act that is considered very reprehensible, dangerous, and detrimental to community life. The idea of a criminalization policy in Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code), concerning the crime of homosexual sexual intercourse has always been challenged, because it is considered to be contrary to Article 28 letter J of the 1945 Constitution of the Republic of Indonesia, because it limits the implementation of universal human freedoms that originate from the 1948 Declaration of Human Rights.[13]

Criminal policy should be based on the provisions of Article 28 letter f of the 1945 Constitution of the Republic of Indonesia. In this regard, the moral norms in Article 495 of the National Criminal Code do not conflict with the particular values of the Indonesian nation, whether derived from Pancasila, the 1945 Constitution, or religious teachings practiced in Indonesia. So that the legal policy of criminalizing same-sex sexual relations in Article 495 of the National Criminal Code can be accepted. The policy of criminalizing same-sex sexual relations for all age groups is a real form of implementing the values of Pancasila. If these values are ignored and not criminalized, then it raises the question of whether this is actually a violation of the principles of Pancasila. The formulation of the provisions of Article 495 of the National Criminal Code is exactly the same as the formulation of Article 292 of the Criminal Code, which is formulated: "A person of sufficient age, who commits an indecent act with another person of the same sex, who is known or should be suspected, that he is not of sufficient age, is threatened with a maximum imprisonment of five years." The formulation of the provisions of this article is one of the crucial problems in the legality of homosexual sexual relations.[14]

The prohibition of LGBT in the TNI institutional environment, as long as it does not involve same-sex sexual relations, can be seen as something that is unfair. Justice is part of human rights that must be recognized, fulfilled, and must be protected, in accordance with human dignity, at the same level and with the same rights and obligations, regardless of race, ethnic origin, lineage or religion [1]. Sexual disorientation is not or is not a choice for the sufferer, but rather a natural or destiny from the Creator that cannot be avoided. Therefore, a state of law must be able to guarantee the justice of the law [2]. Isn't Indonesia a state of law, which must fulfill and protect human rights with the legal rules that are formed. Good law is a law that serves justice for everyone equally, even though it cannot be interpreted as equal and equal. However, justice must provide what is truly a person's right, the law is basically justice.[15]

3.3. Legality of Telegram Letters as Basis for Prohibition of Same-Sex Sexual Relations

Regarding the legality of the TNI Commander's Telegram Letter as the legal basis for the ban on LGBT in TNI institutions, it is necessary to pay attention to the opinion of the Researcher from the Indonesian Defense and Strategic Studies Institute (Lesperssi), Beni Sukadis, who stated that currently the position of the TNI Commander is seen as being equal to the Minister of Defense, because he is appointed and is directly responsible to the President. This opinion is reflected in the provisions of Article 13 of Law Number 34 of 2004 concerning the Indonesian National Army, which is formulated as follows:

- 1) The Indonesian National Army is led by a Commander.
- 2) The Commander in Chief as referred to in paragraph (1) is appointed and dismissed by the President after receiving the approval of the People's Representative Council.

The problem is related to the prohibition of LGBT practices in the TNI institutional environment based on the Commander's Telegram Letter, that the telegram letter has no legal basis in the TNI Law. In accordance with the provisions of Article 15 of the TNI Law "The Commander of the Indonesian National Army, only has command authority", there is no provision of the article that regulates the legal basis for the TNI Commander's authority to issue legal products regarding the prohibition of LGBT practices in the TNI institutional environment. The debate regarding the position of the TNI Commander is equal to the Minister, giving rise to the assumption that the position of the Telegram Letter can be equated with the Minister's decision, so that it has a position as a source of law, continues.[16]

If the argument that the position of the TNI Commander is equal to the Minister, and the TNI Commander's Telegram Letter is a legal product that has equality with the Minister's decision, then the TNI Commander's Telegram Letter has the same nature as a government decision, namely concrete, individual, and final. Therefore, the Telegram Letter based on the TNI Commander's Decree Number Kep/685/IX/2013, only applies and has binding power internally against TNI Soldiers, so that the authority to issue the Telegram Letter has a legal basis.

The next problem concerns the object of the Telegram Letter, namely the prohibition of LGBT practices, which is normatively regulated in the Decree of the TNI Commander Number Kep/685/IX/2013 dated 10 September 2013 concerning the General Administration Guidelines of the Indonesian National Army. The Telegram Letter factually gives rise to different interpretations. The Telegram Letter only states: "LGBT is one of the actions that should not be carried out by a Soldier and is contrary to the official order or an action that is not in accordance with the norms of life of a Soldier based on the Telegram Letter of the TNI Commander No. ST/398/2009 dated 22 July 2009 in conjunction with Article 53 paragraph (2) letter h of Government Regulation Number 39 of 2010 concerning the Administration of Indonesian National Army Soldiers, that a TNI Soldier who commits an immoral violation with the same gender (homosexual/lesbian) according to the considerations of authorized officials cannot be maintained to remain in military service".

This proposition theoretically gives rise to various interpretations, especially regarding what is prohibited, in this case whether the prohibition is related to the existence of LGBT in TNI institutions, or same-sex sexual relations in TNI institutions. If we pay attention to the excerpt from the contents of the TNI Commander's Telegram Letter Number ST/1648/2019 dated October 22, 2019, the emphasis is on the sentence "LGBT is an act that should not be carried out by a Soldier...". Based on the sentence in the excerpt, it can be understood that what is prohibited is the act or practice of LGBT in the TNI environment, in this case the act of same-sex sexual relations. If what is prohibited is same-sex sexual relations, then the next problem is how people with sexual disorientation (LGBT) exist in the TNI institutional environment.

Interpretatively, the TNI Commander's Telegram Letter does not apply to TNI soldiers with sexual disorientation, as long as they do not engage in same-sex sexual relations. This means that soldiers with sexual disorientation are still allowed to become active TNI soldiers.

The definition of a telegram letter in the Decree of the TNI Commander Number Kep/685/IX/2013 concerning the General Administration Guidelines of the Indonesian National Army, in Chapter II, point 14, states that a Telegram Letter is a letter made in telegram style and sent/received through the TNI post office/post office/caraka/courier. So, a Telegram Letter is a letter made in telegram style, so it should not have binding power to be enforced in the prohibition of LGBT in the TNI institutional environment.

In the TNI institution, homosexual sexual relations are seen as an act against the orders of superiors in military life. Therefore, Soldier discipline must and absolutely must be upheld for the growth and development of the TNI in

carrying out and practicing the duties that have been entrusted to it by the nation and state. Military discipline has become an obligation that must be upheld by every TNI Soldier. So that the criminalization of homosexual sexual relations, carried out by TNI Soldiers is considered a form of violation of soldier discipline. Because soldiers who clearly engage in homosexual sexual relations are considered to be able to damage the authority, reputation, dignity and good name of the TNI corps, both those in combat units and those in regional commands, both individuals and units.

The occurrence of same-sex sexual relations in the TNI institutional environment, among others, is caused by the lack of supervision and control of leadership elements, both lower-level leadership elements, as well as middle-level unit leadership elements and high-ranking leaders. In addition, it can also be caused by the lack of awareness and understanding of members in responding to the Sapta Marga, Soldier's Oath, and 8 (Eight) Obligations of the Indonesian National Army in every implementation of duties wherever they are and the lack of awareness of Soldiers in responding to orders from leaders/superiors who give orders, so that they choose the path of fighting their superiors/leaders.

4. Conclusion

The prohibition on LGBT practices based on the TNI Commander's Telegram Letter Number ST/1648/2019 dated October 22, 2019, interpretively emphasizes the prohibition of same-sex sexual relations, and not the existence of LGBT in the TNI institutional environment. This regulation should be carried out through a law whose formation involves parliament as the people's representative, because the prohibition is related to the limitation of human rights, namely sexual relations. The prohibition on LGBT practices with the TNI Commander's Telegram Letter has no clear legal basis, whether as an order of the 1945 NRI Constitution or an order of the TNI Law. In this regard, it is deemed necessary to make changes to the TNI Law by including provisions prohibiting same-sex sexual relations, even including a prohibition on LGBT from becoming TNI soldiers.

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