

## CHAPTER I

### INTRODUCTION

#### A. Background

Homosexuality refers to the sexual attraction between individuals of the same gender, such as between men or between women. Homosexuality has become a serious issue that is debated in various countries regarding its legality. In Iran, homosexuality is considered illegal due to its conflict with Sharia law. Meanwhile, in Brazil, homosexuality is legalized because it is seen as a human right.<sup>1</sup>

In the context of international law, homosexuality is considered legal if such acts are not carried out through coercion, violence, or threats. As explained in Article 2 of the Universal Declaration of Human Rights, which states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."<sup>2</sup>

Throughout different periods and diverse cultures, there have been fluctuations in the acceptance, tolerance, punishment, and prohibition of homosexual behavior. In ancient Greece and Rome, homosexuality was relatively common, and the relationships between adult men and adolescent boys have recently gained significant attention from Western

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<sup>1</sup> Marks, Suzanne M. "*Global recognition of human rights for lesbian, gay, bisexual, and transgender people.*" *Health and human rights* 9.1 (2006): 33.

<sup>2</sup> Article 2 of the Universal Declaration of Human Rights (UDHR).

classical scholars. In Judeo-Christian and Muslim cultures, homosexual behavior is generally perceived as a sin. Nevertheless, many leaders within the Jewish and Christian faiths have aimed to clarify that their religious convictions prohibit specific actions rather than targeting individuals or even their "inclinations" or "orientations." Others, ranging from factions within various branches of Protestantism to Reform rabbi organizations, have advocated for complete acceptance of homosexuals and their relationships, citing theological and social rationales. This subject has the potential to generate divisions within specific religious denominations.<sup>3</sup>

Attitudes towards homosexuality are generally changing, partly due to increased political activism (see gay rights movement) and efforts by homosexuals to be perceived not as abnormal personalities but merely as different from "normal" individuals in terms of their sexual orientation.<sup>4</sup> Conflicting viewpoints on homosexuality—as a normal variant of human sexual behavior on one hand, and as psychologically deviant behavior on the other—persist in most societies in the 21st century. However, these viewpoints have largely been resolved (in a professional sense) in most developed countries. For example, the American Psychiatric Association removed the classification of "ego-syntonic homosexuality" (the state of being content with one's homosexuality) as a mental illness in 1973. Nevertheless, some religious groups continue to emphasize reparative

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<sup>3</sup>"Homosexuality Meaning, History, & Facts - Britannica" [Online]. Available: <https://www.britannica.com/topic/homosexuality>. [Accessed: Oct. 3, 2023].

<sup>4</sup>"Understanding sexual orientation and homosexuality - American Psychological Association" [Online]. Available: <https://www.apa.org/topics/lgbtq/orientation>. [Accessed: Aug. 18, 2023].

therapy in attempts to "cure" homosexuality through prayer, counseling, and behavior modification. However, their claims of success are controversial. Wherever free expression of opinions is possible, debates about homosexuality are likely to continue.

Psychologists in the 19th and 20th centuries, some of whom categorized homosexuality as a type of mental disorder, formulated various theories regarding its origins.<sup>5</sup> Richard von Krafft-Ebing, a psychologist from the 19th century whose work "Psychopathia Sexualis" (1886) included concepts like masturbation, sado-masochism, and "lust-murder" as sexual deviations, believed that homosexuality had a hereditary basis. His contemporary, Sigmund Freud, described it as a consequence of conflicts in psychosexual development, which included the identification with the parent of the opposite sex. Others explored social influences and physiological events during fetal development as potential causes. It's probable that many instances of homosexuality arise from a combination of inherent or genetic factors and environmental or social influences.

By the 21st century, many societies began discussing sexuality and sexual practices more openly. Alongside an increasing acceptance of homosexuality as a common expression of human sexuality, long-held beliefs about homosexuals began to lose credibility. Stereotypes of male homosexuals as weak and effeminate, and lesbians as masculine and

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<sup>5</sup> Herek, Gregory M. "Sexual orientation differences as deficits: Science and stigma in the history of American psychology." *Perspectives on Psychological Science* 5.6 (2010): 693-699.

aggressive, which were prevalent in the West in the 1950s and early 1960s, have largely become irrelevant.<sup>6</sup>

In the 20th-century The United States, a field known as sex research was established within the social and behavioral sciences to investigate actual sexual practices. Researchers like Alfred Kinsey reported that homosexual activity often follows a pattern in adolescence, both among males and females. For instance, the Kinsey Report of 1948 found that 30 percent of adult American males among Kinsey's subjects had engaged in some homosexual activity and that 10 percent reported their sexual practices had been exclusively homosexual for at least three years between ages 16 and 55. About half as many women in the study reported predominantly homosexual activity. However, Kinsey's research methods and conclusions faced criticism, and subsequent studies yielded somewhat differing and varying results. Various recent surveys, covering predominantly homosexual behavior as well as same-gender sexual contact in adulthood, have produced results both higher and lower than those identified by Kinsey.

Instead of categorizing individuals in absolute terms as either homosexual or heterosexual, Kinsey observed a spectrum of sexual activity, with exclusive orientations of either type representing the extremes. Most people can be identified somewhere on either side of the

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<sup>6</sup> Gonsiorek, J. C. *Introducing Psychology of Sexual Orientation and Gender Diversity* [Editorial]. *Psychology of Sexual Orientation and Gender Diversity*, 1(S) (2013), 1–2. <https://doi.org/10.1037/h0095935>

midpoint of the spectrum, with bisexuals (those who sexually respond to individuals of both sexes) positioned in the middle. Situational homosexual activity tends to occur in environments like prisons, where heterosexual contact is unavailable.

As mentioned earlier, different societies react diversely to homosexuality. In most of Africa, Asia, and Latin America, both the subject and the behavior of homosexuality are seen as forbidden, with some minor exceptions in urban areas. Western countries tend to have more lenient attitudes. Although homosexuality was seldom discussed openly in public discourse in the early 20th century, it became a political concern in many Western nations in the latter part of the century. This was particularly noticeable in The United States, where the gay rights movement is often seen as an extension of various civil rights movements from the 1960s.

Following the 1969 Stonewall riots, during which New York City police raided a gay bar and met resistance, many homosexuals gained the courage to reveal their identities as gay men or lesbians to friends, family, and even the general public. In North America and Western Europe, heterosexual populations became more aware of gay and lesbian communities. Numerous gay men and lesbians began to demand equal rights in employment, housing, and public policy. As a result of their activism, many jurisdictions enacted laws to prohibit discrimination against homosexuals, and an increasing number of American and

European employers extended "domestic partner" benefits, similar to healthcare, life insurance, and in some cases, pension benefits, to same-sex couples. Although conditions for gay individuals improved in Europe and North America by the early 21st century, violence against gay individuals persisted in other parts of the world. For example, police officers in Namibia were ordered to "eliminate" homosexuals. Gay students in Jamaica's Northern Caribbean University faced physical assaults, and an anti-gay group named Acorda Coracao in Brazil was implicated in the killing of several gay people. In Ecuador, a gay rights group called Quitogay received numerous threatening emails and was supported by Amnesty International.<sup>7</sup>

Even in areas where physical violence is not prevalent, intolerance towards homosexuality often remains. However, there are signs of change. For instance, Albania repealed its sodomy laws in 1995, and in 2001, gay couples in Amsterdam were legally married under the same laws as heterosexual couples (rather than under laws that permitted them to "register" or form "domestic partnerships").<sup>8</sup> In the late 20th century, more gay men and lesbians openly disclosed their sexual orientation. Some individuals, particularly those in the public eye, had their sexual orientation revealed by activists, either advocating for or against gay rights—a controversial practice known as "outing".

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<sup>7</sup> "Gay students beaten in Jamaica" [Online]. Available: <https://www.bbc.com/news/world-africa-65034343>. [Accessed: Aug. 19, 2023].

<sup>8</sup> Sanders, Douglas. "*Human rights and sexual orientation in international law.*" (2002): 13-44.

A significant concern for gay men in the final decades of the 20th century and beyond was AIDS. While AIDS spread primarily through heterosexual sex in many parts of the world, it was particularly widespread in urban gay communities in The United States and some European cities. Consequently, homosexuals played a crucial role in advocating for research on the disease and supporting its victims through organizations like the Gay Men's Health Crisis in New York City. Author and playwright Larry Kramer, who believed a more assertive approach was necessary, established the AIDS Coalition to Unleash Power (ACT UP).<sup>9</sup> This organization promoted political action, including outing, through local chapters in cities such as New York, Los Angeles, San Francisco, Washington, D.C., and Paris. The disease also took a significant toll on the arts communities in these cities, influencing much of the artistic output of gay men in the late 20th century, imbued with the theme of profound loss.

Lesbians, especially those not involved in intravenous drug use or the sex trade, were probably the demographic least affected by AIDS.<sup>10</sup> Nonetheless, like gay men, they desired acceptance within the global community, free from violence and discrimination, striving for equal legal

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<sup>9</sup> "HIV/AIDS and Education: Lessons from the 1980s and the Gay Male Community in the United States" [Online]. Available: <https://www.un.org/en/chronicle/article/hivaids-and-education-lessons-1980s-and-gay-male-community-united-states>. [Accessed: Aug. 19, 2023].

<sup>10</sup> Maguen, Shira, Lisa P. Armistead, and Seth Kalichman. "Predictors of HIV antibody testing among gay, lesbian, and bisexual youth." *Journal of Adolescent Health* 26.4 (2000): 252-257.

treatment and rejecting any form of behavior that enforces second-class citizenship.<sup>11</sup>

In the context of Indonesia, there has been an increased awareness of alternative sexualities and transgender identities since 1980. During this time, there has been a significant shift in the discourse surrounding sexuality, which has influenced how the state regulates it. In this study, the author examines the changes in the regulation of sexuality in Indonesia from 1980 onwards, as observed through media, State, religious, and lesbian and gay activist discourses on sexuality. The author identifies three distinct periods that have shaped the regulation of sexuality in Indonesia. First, during the era of the Suharto regime under the New Order, there was an attempt to control sexuality through the lens of gender. Print media played a crucial role during this time in both promoting and stigmatizing certain representations of homosexuality. Second, there was a shift in State and Islamic discourses on sexuality during the 1990s, responding to international pressures to support same-sex marriage and sexual rights. Third, following the end of the Suharto regime in 1998, an increasingly vocal conservative Islamic minority pushed for more stringent laws within the State Penal Code governing public sexual behaviors and morals. This led to intense public debates about the role of the state in matters of sexuality. Throughout these periods, the discourse on sexuality transitioned from strategically linking normative gender with

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<sup>11</sup> Epprecht, M. (2013). *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance*. Bloomsbury Publishing.

heterosexuality and marriage to directly legislating heterosexual marriage. This was done through efforts to criminalize various sexual practices.

Indonesia has maintained a neutral legal stance towards homosexuality. Since its inception in 1945, the country has not enacted laws prohibiting transgender behavior or sexual relationships between adult individuals of the same gender.<sup>12</sup> In the State Penal Code, only same-sex relationships involving individuals who have not reached adulthood (not yet of legal age) are considered illegal.<sup>13</sup> While there are no laws prohibiting homosexuality among adults, lesbian and gay activist groups in Indonesia highlight a prevailing pattern of discrimination targeted at gay, lesbian, and waria individuals.<sup>14</sup> While figures who identify as transgender and those with gender ambiguity were recognized in ritual and performance contexts in Indonesia before the 1980s, individuals identifying as lesbian and gay began to be visible in the early 1980s.<sup>15</sup> During this time, the terms "lesbian" or "lesbi" and "gay" began to be used in mainstream media, playing a significant role in shaping and circulating discourses about lesbian and gay identities. Simultaneously, some Indonesians started using these terms to identify themselves.<sup>16</sup> Lesbian and gay individuals have faced death threats, exclusion from families and

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<sup>12</sup> Blackwood, Evelyn. "Regulation of sexuality in Indonesian discourse: Normative gender, criminal law and shifting strategies of control." *Culture, health & sexuality* 9.3 (2007): 293-307.

<sup>13</sup> Article 292 of the State Penal Code.

<sup>14</sup> Boellstorff, Tom. "Playing back the nation: Waria, Indonesian transvestites." *Cultural Anthropology* 19.2 (2004): 159-195.

<sup>15</sup> Blackwood, E. (2010). *Falling into the lesbi world: Desire and difference in Indonesia*. University of Hawaii Press.

<sup>16</sup> *Ibid*

communities, and emotional or physical abuse from their families. One of the founders of the lesbian activist organization Swara Srikandi, established online in 2000, explained in a written response to media inquiries that being homosexual is not easy in Indonesia. She fears not only public animosity but also opposition from her family and workplace if they were to discover that she is a lesbian.

As highlighted by Foucault (1980), the utilization of sexual knowledge in the modern era is not solely juridical and discursive, but operates through a variety of mechanisms to generate knowledge about sex. In Indonesia, discourses about sexuality are deployed in various forms that are interconnected with and distinct from the state, including discourses within families, marriages, communities, and religion. During the New Order period, these discourses were not specifically targeted at homosexuality itself, but rather at the creation of normalized and reproductively capable citizens, and for the majority of Indonesians, citizens who are devout adherents of Islam.<sup>17</sup> While Foucault argues that the utilization of sexuality characterizes the modus operandi of sexual knowledge in the 'enlightened Western world', the primary means of conveying messages of normalization in Indonesia during the New Order era was largely through the deployment of gender (adapted from Foucault's concept). Butler's (1990) analysis of sexuality and gender

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<sup>17</sup> Blackwood, E. (1995) *Senior women, model mothers and dutiful wives: Managing gender contradictions in a Minang kabau village*. In A. Ong and M. Peletz (eds) *Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia* (Berkeley: University of California Press), pp. 124–158.

further clarifies the interconnectedness of the two. Butler states, 'Gender should not only be understood as the cultural ascription of meaning onto a pre-existing sex (juridical perspective); gender also encompasses the entire mechanism of production through which sexes are established.'<sup>18</sup> The utilization of gender as a tool of power in Indonesia is evident in the discursive practices of the state, religion, and popular media. This approach aims to marginalize and stigmatize practices that deviate from the norms of reproductively capable citizenship.

In this undergraduate thesis, the author will discuss Crimes Related to Homosexuality in Indonesian Criminal Law, with a focus on explore the criminalized provision relating to homosexuality in the Indonesian Penal Code. The author will also offering preventive measures against crimes related to homosexuality in Indonesia. The objective of this thesis is to contribute to the development of knowledge and thinking regarding the enforcement of laws against crimes related to homosexuality from the perspective of Indonesian criminal law, entitled: "**Homosexuality-Related Crime in Indonesian Criminal Law**".

## **B. Research Problem**

1. How is homosexual-related crime governed under the 1946 Indonesia Penal Code and the 2023 Indonesia Penal Code ?

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<sup>18</sup> Butler, J. (1990) *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge).

2. What are the preventive measures against homosexual-related crimes in Indonesia?

### **C. Objective of Research**

1. To understand the the regulation of homosexual-related crime under the 1946 Indonesia Penal Code and the 2023 Indonesia Penal Code.
2. To understand the preventive measures against homosexual-related crimes in Indonesia

### **D. Benefit of Research**

1. Objective Benefit

In the field of law, particularly Indonesian Criminal Law, this undergraduate thesis proposal aims to provide an overview of the government's response to crimes related to homosexuality in Indonesia.

2. Subjective Benefit

- a) To Government

The composition of this undergraduate thesis proposal is anticipated to contribute to the knowledge and insights of anyone interested in the field of criminal law and crimes related to homosexuality, as well as the government's approach to addressing them. Specifically, it focuses on how Indonesian Criminal Law can be applied in cases of this nature.

- b) To Student

This undergraduate thesis aims to provide and expand the research landscape concerning crimes related to homosexuality within Indonesian criminal law. It is envisioned that this study could serve as a reference for other researchers interested in issues related to crimes associated with homosexuality.

## **E. Research Method**

### **1. Type of Research**

This study adopts a normative legal research methodology using an analytical approach that encompasses examination of legal principles, systematic legal analysis, legal synchronicity, legal history, and legal comparison. In my research, the primary focus is on examining and analyzing secondary data, which consists of homosexuality-related crime in Indonesia.

### **2. Type of Data**

This research uses secondary data that consist of primary legal material, secondary legal material, and tertiary legal materials. Secondary data is a method of research to collect data from the library research of literature. The secondary data to be searched are:

#### **a. Primary Legal Material**

The primary legal materials such as legal documents, legislations and treaties which have relevancy to the research should be obtained, they are:

- 1) 1945 Constitution;
- 2) 1946 of Indonesia Penal Code;
- 3) 2023 of Indonesia Penal Code;
- 4) Constitutional Court Decision No. 46/PUU-XIV/2016; and
- 5) Law No. 1 of 2023.

b. Secondary legal material

Several books, journals, and scholarly doctrines related to crimes involving homosexuality.

c. Tertiary legal materials

Legal dictionaries concerning crimes related to homosexuality.

3. Data Collection Techniques

In this legal research, data is obtained through literature study. The literature study is conducted by reading and a various literature materials related to the research problem, including legal and non-legal sources, and then collecting the necessary data. Additionally, additional data is also obtained through interviews with informants.

**F. The Systematics of Undergraduate Thesis**

The author divides the writing of this thesis into 5 chapters. The systematics of thesis writing is as follows:

Chapter I : Introduction

This chapter describes the background of the problem, problem formulation, research objectives, research benefits, research methods, and systematics of undergraduate thesis writing.

## Chapter II : Overview of Crime

This chapter explains the definition, classification, criminal policy, and criminalization.

## Chapter III : Overview of Homosexuality

In this section the author explains the definition, the common characteristic of homosexuality, the impact of homosexuality and philosophical, sociological, and juridical approaches to homosexuality.

## Chapter IV : Homosexual-related crimes in Indonesian Penal Code

Describes the homosexual-related crimes under the 1946 Indonesia Penal Code, 2023 Indonesia Penal Code, and the prevention of the homosexual-related crimes in Indonesia.

## Chapter V : Conclusion

This chapter contains conclusions and suggestions.