THE CONSTRUCTION OF BISEXUAL ACT AS A GROUND FOR DIVORCE ON CRITICAL LEGAL STUDIES PERSPECTIVE

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Abstract: Bisexuality as an orientation deviation that places a person to be able to have sexual relations both against the opposite sex and the same sex, today has become a social problem as well as a legal issue that seems to be still not expressly regulated in the legislation. Especially if bisexual acts are committed in a legal marriage institution by a husband or wife, while in it there are no constant quarrels. This article discusses bisexual acts committed in marriage with two focuses of discussion, namely bisexual acts in legislation from the perspective of critical legal studies (CLS) and legal reformulation of future laws and regulations. Through the type of normative research with legal, philosophical, and conceptual approaches, this article argues that the normativity of bisexual acts in marriage from the CLS perspective is still a requirement for an individualist-liberal legal style. The article argues that a reformulation of some regulations in Indonesia is necessary. This article offers a reformulation with two things. First, adding the offense of same-sex adultery to Article 411 to Article 411A of the Criminal Code. Second, amend and add authentic interpretations to the Explanation of Article 39 paragraph (2) of Law Number 1 of 1974 concerning Marriage, Article 19 letter a of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, and Article 116 letter a of the Compilation of Islamic Law.

Keywords: Bisexual, Law Reformulation, Divorce


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Introduction

Legal vacuum (rechtsvacuum) is one evidence of the many legal problems. This is natural to understand, because the development of uncertain times (disruption) has forced very rapid changes in society. Meanwhile, the law as it is known almost always seems to come late in responding to social problems.

The law is always present with the community or what is known by Marcus Tullius Cicero’s maxim with the term "ubi societas ibi ius". Irianto argues that even though it is always late to respond to societal developments, laws must still be drafted and realized while still referring to the legal politics of the Unitary State of the Republic of Indonesia (NKRI). This effort is commonly understood, because the state is obliged to protect the whole nation and all of Indonesia’s bloodshed.

One of the things that received a slow response from the government in this research problem is the issue of the rights of lesbian, gay, bisexual, and transgender (LGBT) people. Referring to the online daily Republika, the issue of LGBT rights has experienced a massification since the last fifteen years. LGBT people began to openly campaign for themselves, from an individual nature, to groups and even organizations. Ismail Sukardi in the article described that one of the causes of the massification of LGBT issues in Indonesia is a passive law that is unable to accommodate public anxiety about LGBT.

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1 Rhenald Kasali, Disruption: Tak Ada Yang Tak Bisa Diubah Sebelum Dihadapi, Motivasi Saja Tidak Cukup (Jakarta: Gramedia, 2017), 3-7.
The legal vacuum can actually be viewed in the context of Islamic civil law within the religious courts. Even though Islamic law is based on the Qur'an, Sunnah, and the fiqh and although it strictly prohibits LGBT, the reality and legal consequences are often neglected. In this position, I need to focus on the issue of LGBT on bisexuality, someone with multiple sexual orientations (non-heterosexual) who likes the opposite sex and the same sex at the same time.⁶

The reality shows that there are couples who initially get married fairly – both based on the provisions of Article 1 of Law Number 1 of 1974 concerning Marriage (Marriage Law) and Article 2 of the Compilation of Islamic Law (KHI). However, it was later discovered that apart from having sexual relations with a legal husband or wife. It turns out that they also have sexual relations with the same sex. The concrete examples can be seen in the following several decisions of the Religious Courts.

Pariaman Court Decision Number 69/Pdt.G/2019/PA.Prm is the first example. In this case, the husband who had been married to a woman, after being married for several years, was found to have had sexual relations with other men.⁷ This decision does not explicitly grant the plaintiff’s claim based on the husband’s bisexual reason, but is based on continuous disputes and the husband’s negligence in providing alimony to his wife.

Another case published by the Klaten Religious Court Decision Number 1775/Pdt.G/2018/PA.Klt. It is known that since 1997 the plaintiff (wife) and the defendant (husband) have been legally married. However, since 2004 the husband has been known by his wife that he likes the man, no longer supports his wife and children, and commits acts of violence. Regarding this problem, the examining judge of the case handed down a decision on ba’in sughra divorce on the grounds that the

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marital relationship between the plaintiff and the defendant was not harmonious.8

Another example is also shown in the Bireuen District Syar‘iyyah Court Decision Number 0266/Pdt.G/2015/MS/BIR which decided the case between the wife as the plaintiff and the husband as the defendant. The family dispute started when the wife accidentally read her husband's conversations on Facebook social media which showed frequent intimate contact. The husband even slept with a man he had just met at an inn in Bireuen Regency.9 Based on this problem, the Syar‘iyyah Court of Bireun Regency decided to divorce the plaintiff and the defendant with legal considerations referring to the reasons for the divorce Article 19 letter f of Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage (Government Regulation on Marriage). The article explains that the divorce can be decided when between the wife and husband commit to quarrels so that harmony no longer occurs.10

It can be seen from all the examples of religious court decisions above –apart from the limited examples of bisexual cases in the literature– that the argument for divorce based on bisexuality even though it is included in the considerations, the judge will only state that the reason for the divorce is continuous disputes. The judge did not place bisexual reasons as the main motivation in issuing the divorce decision. Comprehensively, looking at the reasons for filing for divorce in the Religious Courts as described in Article 19 of the Government Regulation on Marriage, the issue of LGBT can only be approached on the basis of adultery which is described in general. Meanwhile, descriptions of deviant sexual behavior such as LGBT, especially bisexuality, are not explained at all as reasons that can be submitted in divorce cases.

It is implicitly possible that Article 19 letter f of the Government Regulation on Marriage is considered quite accommodative, because constant disputes almost always occur when various factors that damage the husband-wife relationship are carried out. Regarding the provision for persistent disputes between husband and wife as accommodated in

10 Sari, 47.
Article 19 letter f, according to Nurmasliana, as quoted from several judges' statements at the Barabai Religious Court, this provision exists to accommodate minor quarrels between husband and wife. As for the big disputes which have a heavy impact, they are actually described in Article 76 of Law Number 7 of 1989 concerning Justice, namely the syiqāq problem.  

The position of reasons for divorce under the pretext of continuous disputes is actually an anticipation of the dynamics of husband-wife relations. As described in the legal considerations of the Constitutional Court Decision Number 38/PUU-IX/2011 that the basic reason for divorce Article 19 of the Government Regulation on Marriage is the Explanation of Article 39 paragraph (2) of the Marriage Law which provides leeway for the panel of judges examining cases to determine whether a marriage can still be maintained in terms of harmony between husband and wife.  

No matter how good the legal ratio for forming norms in Article 39 paragraph (2) of the Marriage Law and its explanations and derivatives Article 19 letter f of the Government Regulation on Marriage, normatively the Article 19, letters (a) to (e) show that a divorce can also be filed without any disputes. formerly. This can be understood from the a contrario legal construction method from civil law which determines that if a norm is determined by law, it does not mean that paired norms are also regulated. The legal ratio of the provisions of Article 19 Government Regulation on Marriage can be understood that even though there is no dispute between husband and wife, if there are certain actions that can damage the purpose of carrying out the marriage – even become a consensus towards harm, then it can be used as a basis for divorce. Included in this issue is bisexuality that occurs in legal marriages. In the criminal law context, there is also no legislation that specifically regulates LGBT issues, including bisexuality. The issue is only alluded to in Government Regulation Number 54 of 2007 concerning

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Implementation of Adoption, Article 292 of the Criminal Code, and Law Number 44 of 2008 concerning Pornography.

In addition to the observations in the juridical aspect above, in the sociological context, bisexuality has the potential to injure community rights and disrupt public order. It can be seen in several cases of murder based on jealousy. First, the murder case by a man against his gay couple, because he found him having an affair with a woman. Second, the murder case by two people, SA and BM, against a man, DS, in Tanggamus. SA is his ex-girlfriend and BM is his ex-boyfriend (gay couple). BM is annoyed because DS is already married and often does not pay off the sexual relations he has had so far. The interesting thing that can be seen from this case, is that before DS was killed BM and DS had sexual intercourse. Third, the case of a wife having an affair with two women at the same time in one bed in Makassar. The husband eventually discovered that his wife was naked with two other women on the bed. These descriptions reinforce how important it is to guard against bisexual issues in marriage.

The previous studies show the same theme with difference focus. Indra Tua, Iqbal Kamaluddin, and Nila Arzaqi examined how criminal law was able to deal with LGBT from a Pancasila perspective. Mabar Ali, Suhaidi, and Mustamam looked at the extent to which the norms of the Criminal Code (KUHP) regulate LGBT issues in Indonesia. They concluded that positive criminal law in Indonesia has not sufficiently accommodated how to deal with LGBT issues. In the judicial context, Arrizal, Ali Fauzi, and Sasongko reviewed several decisions at the Putussibau Religious Court and the Klaten Religious Court on LGBT cases.

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They found that an annulment of a marriage due to the fact that one of the partners suffers from LGBT is legal, whereas in a divorce case – because the defendant was not present, only the _verstek_ was terminated – it is also possible.\(^{19}\) On another occasion, Liza reviewed a divorce case decision due to LGBT at the Pariaman Religious Court. She found that the divorce suit can be granted based on the reason that frequent fights occur, not because of LGBT.\(^{20}\) The same thing was found by Lita Mardani at the Ambon Religious Court. The reason used to divorce a lesbian wife was the reason for continuous disharmony as set forth in Article 39 paragraph (2) of the Marriage Law.\(^{21}\)

Based on the description above, it has been seen that there is still a legal vacuum that postulates the gap between _das sein_ (empirical facts) and _das sollen_ (ideality). Not only that, several existing studies have not touched on aspects of constructive criticism of various marriage regulations in Indonesia. At this point it is necessary to re-read the legal regulations related to divorce in order to be able to position bisexual reasons as an integral part with a strong paradigm foundation. In other words, there needs to be a reformulation of several positive legal regulations regarding marriage in Indonesia.

In this position, this article is presented using a critical legal study paradigm, a paradigm that is used based on understanding to analyze more deeply the existence of education, practices, doctrines, and legal systems that are not egalitarian – they even tend to be called oppressive. Peter Fitzpatrick in Munir Fuady further states that the critical legal paradigm is used as an alternative basis for examining the role of law in shaping social, political and economic relations in order to side with humanity.\(^{22}\)

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20 Liza, "Analisis Yuridis Perceraian Disebabkan Suami Biseksual (Studi Putusan Pengadilan Agama Pariaman Nomor 69/PDT.G/2019/PA.Prm)."


22 Munir Fuady, _Alian Hukum Kritis: Paradigma Ketidakberdayaan Hukum_ (Bandung: Citra Aditya Bakti, 2003), 4-5.
There are three stages that must be elaborated in a critical legal study, namely trashing, deconstruction, and genealogy. Trashing is carried out by taking an inventory of the theories, principles and principles of public and private law relating to bisexual issues. In other words, trashing is an effort to identify the legal ratio relating to bisexual acts in marriage. Deconstruction is the second stage, which works to undermine the legal conception that has been well understood so far. Genealogy is the final stage of tracing the original intent, historical interpretation, and teleology of a norm that intersects with bisexual acts. Therefore, this article is of a normative research with a statutory, philosophical and conceptual approach.

Discussion
The Normative Acts of Bisexual Couples on Critical Legal Studies Perspective

Historically, studies on bisexuality cannot be separated from LGBT issues. This is because the initial form underlying the act of bisexuality is gay or lesbian. The forerunner of bisexual history appeared at the time of Prophet Lut a.s., in which the quantity of lesbians was as large as gays. This is where the legal construction gay or lesbians relations in Islam is formed. If it is committed by fellow men it is called liwāth (gay), whereas if it is committed by a woman it is called siaq (lesbi). The term bisexual in fiqh literature is called sunāiyal jins, which if it is only a desire for sexual orientation – without being manifested in an act, it is not sinful. In the history of Ancient Greece, this relationships were also recorded through the hobby of Sappho, a Greek female poet, who often wrote love poems for both women and men.

Bisexuality which is included in the LGBT framework is actually not a new issue in Indonesia. Citrawan explained that the LGBT movement in Indonesia had existed since 1960, consisting of transgender women or at

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25 Mulyono.
that time known as 'banci'. Eight years later, the term was tried to be refined by the term 'wadam', which is an acronym for 'wanita-adam' (women-men). It is known that the term 'wadam' did not last long, because many Muslims feel insulted by the mention of 'adam' compared to women. It was only in 1980 that this group declared the nomenclature for its group as women-men or what is now known as 'waria'.

The context of discussing bisexuality in this chapter’s substitution will describe the attitudes and perspectives of legislation in Indonesia as well as Islamic law towards bisexual issues. It is hoped that this explanation will lead to postulates of systematic thinking in the main findings and discussion. Therefore, the placement of critical legal studies as a paradigm, starting point, and framework of reference suggests that this research should mutatis mutandis follow the stages of analysis of critical legal teachings starting from trashing, deconstruction, and genealogy. Its implementation is manifested in the following three discussions.

The Trashing Approach: Regulatory Inventory

Before there is specific normalization in legislation, there are rules and theories behind it. Furthermore, behind the rules and theories, there is a philosophy (principle) which is also the background. Another term used by I Dewa Gede Atmadja and I Nyoman Putu Budiartha as quoted from Jan Gissels and Mark van Hocke is the three layers of legal science; philosophy, theory and dogmatics. In this context, an analysis of the normativity of bisexual acts based on the trashing approach – borrowing Mukthie Fadjar’s term – is a process of delegitimizing the study of legal theories that are solely in favor of liberalism. Critical legal studies believe that the theoretical construction of law regarding bisexuality is not based on communal interests, but only in favor of destructive individual freedom.

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a. Trashing Approach in Legislation Concerning Public Law

The issue of bisexuality is not specifically regulated. There are only a few norms in a number of laws and decisions that offend LGBT people in general.

1) Article 13 letter f Government Regulation Number 54 of 2007 concerning Implementation of Child Adoption

This article explains that the conditions for being able to adopt a child must meet the requirements – one of which is – not being a same-sex couple. Reviewing the general explanation of the a quo regulations, basically adoption is carried out so that deviations do not occur. Often the practice of adopting children is oriented toward human trafficking.

If understood further, the various conditions for adoption are derivatives of Article 39 paragraph (1) of Law Number 23 of 2002 concerning Child Protection (Child Protection Law). As a lex inferiori of the Child Protection Act, the purpose of regulating child adoption is to provide the best interests of the child. Regarding the presence of the condition for adopting a child who is not a same-sex couple, it can be seen that the poor legal ratio of same-sex couples in terms of the needs of the child.

2) Article 292 of the Criminal Code (KUHP);

The formulation of Article 292 of the Criminal Code states that adults who commit obscene acts against minors of the same sex are subject to a maximum sentence of five years. The provisions of this regulation indicate the prohibition of same-sex obscenity against children.

The use of the term 'obscene' in the context of Article 292 of the Criminal Code is actually in line with and has the same meaning as Article 289 of the Criminal Code. This is distinguished by the term 'rape'. According to Prodjodikoro citing Lengemeyer, rape includes crimes and violations of decency by penetrating male genitalia against female genitalia. The term obscenity, on the other hand, is a violation of decency over other people's bodies outside of male-female penetration. 30

30 Wirjono Prodjodikoro, Tindak-Tindak Pidana Tertentu Di Indonesia, III (Jakarta: PT Eresco, 1980), 49-52.
Salasa and Rahmawati emphasized that provision 292 of the Criminal Code does not explicitly prohibit homosexual acts, because the addressed subject is an adult, while the addressed norm is a child. This clearly shows that homosexual behavior in the Criminal Code is not a crime.\(^{31}\)

3) Article 4 paragraph (1) letter a Law Number 44 of 2008 concerning Pornography (Pornography Law):

The provisions of Article 4 paragraph (1) letter a of the Pornography Law outlines that everyone is prohibited from creating content, distributing, duplicating, trading, and all certain actions that contain elements of obscenity, violation of social norms in society, or sexual exploitation, one of which is sexual intercourse deviate.

According to the elucidation of the Pornography Law, the authentic interpretation of the term ‘deviant intercourse’ is sexual activity or intercourse with corpses, anal, lesbian, homosexual, oral sex, and with animals. Explicitly criminalizing deviant sexual intercourse is a prohibition to produce material in a certain visualization, not directly prohibiting the act.


The last context is the Constitutional Court Decision Number 46/PUU-XIV/2016 (MK Decision No. 46/PUU-XIV/2016). It can be seen from the three test application materials; Article 284 of the Criminal Code regarding adultery, Article 285 of the Criminal Code regarding male rape of women; and Article 292 of the Criminal Code regarding child abuse.

Directly related to the homosexual issue, the applicants wisht to change the addressed subject in Article 292 of the Criminal Code wider, from only for an adult to for everyone. Regarding the request for judicial review, the Constitutional Court actually rejected the request for judicial review by four Constitutional Justices who had dissenting opinions.\(^{32}\)

The legal ratio adultery as a crime against decency, according to Prodjodikoro, was a ban for the European group which at that time

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was dominated by monogamy. The European group is bound by a sacred promise in the church to remain in monogamous marriage. Adultery as an offense under Article 284 paragraph (2) of the Criminal Code can only be filed after the issuance of a divorce decision. As for the withdrawal of case files based on the agreement of the plaintiff and the suspect, it can still be carried out as long as the trial examination of the case has not started before the panel of judges.

Adultery in the context of Article 284 of the Criminal Code is only a crime and a violation of decency, so that in terms of the severity of the penalty, it is a maximum of nine months in prison. This implies that it is only the morality that the state wants to maintain towards its citizens. Even, if the complainant (husband or wife) does not mind, then it is not a problem.

Based on the above explanations, it can be stated that criminal acts of obscenity, adultery, and pornography is liberal. As long as no party feels injured – considered to be a victim –, the Indonesian criminal law does not regard it as a threat to public order, interests and peace.

The normative view of criminal law above indicates that there has indeed been a paradigm that is too liberal. There needs to be delegitimation (trashing) of this legal thought, because if it refers to the highest constitutional basis, then Pancasila - especially the First Precepts - needs to be implemented. The law needs to rely on religious provisions and beliefs held by the community as a reflection of the highest sense of justice and morality.

b. Trashing Approach in Legislation Concerning Private Law

This section will begin with an inventory of the normativity of legal actions in the civil field related to bisexuality. The distinction in discussion between aspects of public law and private law is based on Apeldoorn's view that in private law it is not the public interest that is to be protected, but the relationship between legal subjects. In the context of civil law, if there is bisexual behavior on one married couple, ideally one of the other parties feels injured by their civil rights. Therefore, it is

necessary to verify the legal rights and obligations of husband and wife in marriage. Some rules of private law are, Articles 103 to 118 of the Indonesian Civil Code, Articles 30 to 34 of Law Number 1 of 1974 concerning Marriage (Marriage Law), and Articles 77 to 84 Compilation of Islamic Law (KHI).

Based on the legal principle which states that law does not apply retroactively or backwards (non-retroactive), the discussion of the rights and obligations of the wife in the Criminal Code only applies to Indonesian citizens who held marriages before 1974 - before the issuance of the Marriage Law. The Civil Code, in looking at rights and obligations in marriage, appears too patriarchal by making the wife an inappropriate party to carry out civil rights independently. The only rights and obligations that are broadly alluded to are the provisions of Article 103 of the Indonesian Civil Code which states that a husband and wife must help each other, be loyal and help each other.

Reviewing the provisions on the rights and obligations of husband and wife in the Marriage Law, it can be seen that in outline the patriarchal paradigm has changed from the Civil Code to a more egalitarian paradigm. Based on the provisions of Article 31 paragraph (2) of the Marriage Law, the wife currently has the right to take legal action independently. Regarding mutual loyalty, love and respect, Article 33 of the Marriage Law also regulates it.

Not much different from the Marriage Law, basically Article 77 of the KHI also outlines the rights and obligations of husband and wife which are more egalitarian than the Civil Code. Regarding being loyal to one another, respecting and helping each other is also described in Article 77 paragraph (2) of the KHI which has also been stipulated, but with the provisions that one is also obliged to maintain honor for oneself and for one's partner (vide Article 77 paragraph (4) of the KHI).

The three rules above, however, always allude to the words 'loyalty, love each other, and help each other'. This indicates that the prohibition of betraying one another is a legal ratio of the legislation above. The rights and obligations of husbands and wives that are neglected, explicitly in Article 34 paragraph (3) of the Marriage Law and Article 77 paragraph (5) of the KHI can be used as a basis for divorce.
If one of the parties neglects the obligations and rights of husband and wife to be loyal, to love, and to help each other it – especially in the context of bisexuality, a lawsuit or request for divorce can be carried out. Neglect of marital rights and obligations in Article 209 of the Indonesian Criminal Code is implemented in the following actions; adultery, leaving the residence together, the imprisonment of party for five years or more, and the abuse against a spouse which results in serious injury or can endanger safety.

Regarding the specification of norms resulting from the violation of rights and obligations in the household, the Marriage Law through its implementing regulations, Article 19 the Government Regulation on Marriage outlines the reasons for divorce. There are six reasons concerning on adultery, leaving the partner for two years without reason and permission, the imprisoned husband or wife for five years, persecution or atrocities, disability implying on fulfilling husband and wife obligations, and disputes. Article 116 of the KHI at least has a lot of conformity and norms that are identical to Article 19 the Government Regulation on Marriage with the addition of two other reasons; breaking taklik talak and the condition of apostasy after an Islamic marriage was committed.

The development of regulation on divorce law through the Marriage seems to show positive spectrum.\(^{35}\) However, based on the trashing approach, several contradictions emerged – both actively and passively. Actively, marriages that should be able to be loyal to each other, love and work together as stated in Article 33 of the Marriage Law, precisely with the provisions of Article 19 letter a related to drunkenness and gambling which are difficult to cure, turn out to be reasons for divorce. If it is true that mutual love, mutual loyalty and mutual support are present on both husband and wife, then the problems of addicts, gamblers and drunkards must of course be faced together. Against this argument, an authentic interpretation of Article 1 of the Marriage Law has explained that marriage is closely related to religion and spirituality. Therefore, drunkards, addicts and gamblers which are difficult to cure are religious problems that can be used as a basis for divorce. In contrast to this, passively bisexual acts were not accommodated as a reason for divorce.

\(^{35}\) Syaifuddin, Turatmiyah, and Yahanan, *Hukum Perceraian*, 44-49.
**Deconstruction of the Legal Concept of the Bisexual Acts of a Husband and Wife**

The second stage in the critical legal teaching approach is deconstruction, breaking down the conception of law that has been understood so far. Contextualization in this study implies that all legal concepts – related to philosophical foundations and legal theories – will be identified, then dismantled to be rearranged. The deconstruction process in legislation that addresses bisexual acts is classified based on public (criminal) law and private (civil and civil religious) law.

**a. Deconstruction of the Concept of Bisexual Acts in the Sphere of Public Law**

The results of the trashing approach show that the legal concepts of bisexual acts in the realm of public law still postulate on the same norms, namely related to adultery and obscenity in the Criminal Code. These results are then drawn to the second approach, deconstruction. Therefore, the first step before carrying out deconstruction is to understand an important question related to adultery and obscenity about why adultery and obscenity deserve to be subject to criminal sanctions.

Prodjodikoro said that there are two theories of punishment that *vis a vis* each other, namely absolute and positive. The absolute criminal theory explains that an act deserves to be punished based on the assumption that there is human social love (peace) that has been violated, so that it needs to be punished. The relative criminal theory assumes that an act that is considered a crime does not necessarily result in a criminal sanction. This is based on the argument that punishment needs objectives that are spelled out in a juridical, intellectual and moral way. Juridically, if there are legal norms that are violated, then it should be punished (principle of legal legality). Intellectually, so that the perpetrator of the crime can change the basis of his mind towards the act.36

Hans Kelsen has a more abstract conception of criminal law regarding what is meant by an offense. According to him, an act cannot automatically be classified as a crime just because it is a perceived crime.

A new act is referred to as an offense only if legal norms provide for threats of sanctions for the said act.\(^{37}\)

Departing from criminal conceptions and theories related to sentencing, it can be seen that the current legal construction is still closely related to *mala prohibita*. This term means that an act is only referred to as a criminal act only when the act is regulated in the law.\(^{38}\)

The construction of criminal law which focuses on legal certainty is increasingly showing its shortcomings. It is impossible for the law to hold back the rate of development of public perceptions of crime. An example seen in this case is what happened to a husband in Japan who found out that his wife was having an affair with another woman. The judge in Japan considered that the case was an adultery case which could become a basis for sentencing, although there were no specific regulations.\(^{39}\)

**b. Deconstruction of the Concept of Bisexual Actions in the Realm of Private Law**

Bisexual acts that can allegedly disrupt the stability of private law – as described in the previous discussion – are around macro marriage law and micro divorce law. Because of its close relation to the issue of bisexuality, it is necessary to identify the principles of divorce.

There are three principles of divorce that apply in marriage law in Indonesia. First, to make it more difficult for divorce to occur. Second, to realize equal legal protection between husband and wife. Third, ensure the certainty of institutions and legal institutions for divorce. These three principles are actually the implementation of the five principles of marriage which are authentically in the interpretation of the Marriage Law. The five principles are principle of the purpose of marriage, religious principle, administrative principle, monogamy principle, principle of inner and outer maturity, and principle of balance and reciprocity.\(^{40}\)


\(^{40}\) Syaifuddin, Turatmiyah, and Yahanan, *Hukum Perceraian*, 42–49.
The way to deconstruct some of the principles of marriage law and divorce law above at least is only at the level of normativity. It means that when these principles are normalized in a certain article in legislation, it turns out that many are still not accommodated. If marriage law as legality and legal politics for holding marriages in Indonesia is enforced on the basis of religious teachings, it should be mutatis mutandis that religious law is also used as the basis when a marriage relationship is to be terminated. In this condition, it should be underlined that this does not mean that the current conception of divorce law does not implement religious law at all. However, it just does not quite accommodate.

**Genealogy of Normative Behavior of Bisexual Couples in Indonesia**

This section traces the main intent, historical interpretation, to the teleological aspect of a norm related to bisexuality. Some of the norms being tracked are adultery, obscenity, and marriage.

*First,* regarding adultery as previously filed for judicial review in the Constitutional Court Decision Number 46/PUU-XIV/2016, the Judges confirmed that the legal genealogy behind the normalization of Article 284 of the Criminal Code was individualistic teachings and Western liberalism left behind by the Dutch colonialists. It is no exaggeration if the legal theories and norms implemented later also reflect individualistic genealogy and liberalism.

*Second,* obscenity in the context of Article 292 of the Criminal Code has no other original intent to protect minors or minors. Strengthening this opinion, Prodjodikoro explained that basically acts of same-sex sexual relations – or in his language it is called homosexual – are not prohibited. In this case, individualistic and liberal nuances are still found in almost every Criminal Code norm.

*Third,* marriage has several genealogies that are different from one another. Judging from the Criminal Code, the norm is still dominated by Western conservative thinking in Burgerlijk Wetboek which is more patriarchal in nature. In addition, the Civil Code has a lot of background with a legal conception known as the Corpus Iuris Civilis, the codification of civil law in the era of the Roman empire of Justinian. Even though the Corpus Iuris Civilis has lost its legality since the collapse of the Roman

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41 “Putusan Mahkamah Konstitusi Nomor 46/PUU-XIV/2016.”
empire, it is still implicitly implemented by European countries, especially France with the Civil Code. After Napoleon was appointed King of France, several elements of Roman law, old French law, and religious law - Christianity which at that time dominated - were recodified into a unified *Code Civil Francais*.

The reasons for divorce in the context of marriage law, both in the Marriage Law and the KHI, at least still postulate in the Civil Code. There were only adjustments to the philosophical basis of Pancasila and Islamic religious law. Busthanul Arifin in Zainal Abidin et al described that there were three main ideas for the formation of the KHI, namely the positivization of Islamic law in Indonesia, the equalization of the perception of *shar’iyyah*, and the historicity of the life of Islamic law as a sense of justice in society. When the genealogy of marriage law in Indonesia is known to tend to be *fiqh* centric, it would not be an exaggeration to continue to update the norms of Indonesian marriage law gradually. This is because it is in tune with the spirit of dynamic *fiqh*. *Fiqh* must always be updated in accordance with the context of the time and place, or what is commonly known as "*yadūr al-Hukmu ma'a al-'Illatifadiwan 'adaman*".

**Reformulation of the Law on the Bisexual Acts in Indonesia**

This section will describe how to engineer the placement of norms or rules that address the issue of husband-wife bisexuality and what the legal consequences should be. Judging from the negative impacts that have arisen, bisexual households actually have two areas of law, namely private and public. Specifically in the public domain, it appears that bisexuality can be included in the criminal realm. It is commonly understood that if bisexuality committed by a husband or wife in a legal marriage is not regulated and threatened with sanctions, then disorder will arise in society. Communities can take justice into their own hands, because there is no state intervention to regulate.

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Some tragic cases can be examples because there is no firm action (criminalizing) toward bisexual acts. In the first case, a woman killed her partner's husband. The reason is simply because the woman did not accept when her partner was often treated harshly by the partner's husband.46 There is also a simpler case in which a lesbian killed her partner's boyfriend due to blind jealousy that occurred in the Ulujami area, Pemalang, Central Java. 47 The same thing happened in Banyuasin Regency. A man who caught his girlfriend kissing his older sister commit her to kill them.48 There was also a woman who had the heart to kill her lesbi partner's baby because she was jealous that her lesbi boyfriend had sex with a man and gave birth to a child.49

The various reports on bisexual cases above are actually enough to prove that the law so far has not been sufficient to accommodate the sense of justice in society. The law in legislation does not yet have a firm stance on bisexual deviation whose impact is almost the same or even more dire than heterosexual affairs (adultery). Disorder finally occurred, until finally vigilante was inevitable (eigenrichting).

Bisexual acts can be formulated as a new norm in adultery offenses which are regulated later in Article 411A of the New Criminal Code. The sound of the article can be structured as follows:

(1) Everyone who has intercourse with the same sex, shall be punished for same-sex adultery with a maximum imprisonment of 1 (one) year

(2) If the crime of same-sex adultery as referred to in paragraph (1) of this article is committed by one person and/or both husband and wife partners who are bound in a valid marriage, the penalty shall be a maximum of 2 (two) years imprisonment

Bisexual behavior in this case is categorized as an offense of elaboration of adultery with the nomenclature of 'same-sex adultery'.

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There are two types, namely ordinary same-sex adultery and same-sex adultery in marital relations. This is commonly understood, because efforts to criminalize bisexuality cannot be seen only as a single person. Several cases have even proven that bisexual behavior during courtship – not yet bound by marriage – can even pose a danger.

The criminalization of bisexuality by categorizing it as an adultery offense on the one hand is proof of the caution in formulating bisexuality as limited to sexual intercourse. This also strengthens the principle of presumption of innocence in looking at the problem of deviant sexual orientation. Everyone should not easily convict someone who is still considered bisexual, unless it is proven that they have had sexual or sexual intercourse.

The other side of the formulation of bisexuality in adultery offenses is to avoid controversial perceptions regarding LGBT rights. Regardless of whether or not LGBT is recognized in the national legal system, adultery, especially those of the same sex, certainly offends conscience and a sense of justice in society. No couple feels fully willing if they are seconded, especially by the same sex which is even prohibited by religious teachings.

From a criminal point of view, an important point that distinguishes adultery as stated in Article 411 of the New Criminal Code is the alternative threat of suffering. Previously, the examining judge in adultery cases could choose to sentence a maximum of one year in prison or a category II fine. However, in this proposed formulation it is not at all. This is based on the fact that bisexual punishment for victims (opposite-sex couples) is not considered fair, so that in the end the victims will again have the will to take the law into their own hands.

Providing specifications for the description of the results of the discussion above, this discussion will be more directed at the idea of reformulating the realm of private law, namely civil or marriage. The provisions of Article 2 paragraph (1) of the Marriage Law which outlines that the validity of a marriage is viewed from the validity of the respective religious laws, identifying that the legal consequences arising from marriage - including divorce - are also regulated in the provisions of each religion. Divorce for Muslims is filed in the religious court environment, while non-Muslims are filed in the general court.
environment, namely the district court. The material law of divorce in the religious courts, even though they already have KHI, doctrines in fiqh, and a sense of justice in society,

The above argumentation can automatically be understood that even though they have divorce law enforcement in different jurisdictions, substantively they are still the same making the Marriage Law and Marriage Regulation PP as postulates in divorce law. As a result, the enforceability of the divorce law contained in the Marriage Law and the PP on Marriage actually continues to apply in its entirety regardless of any religion.

Regarding bisexuality which has the potential to undermine the purpose of marriage, which is to form a happy and eternal family based on Belief in One Almighty God (in the Marriage Law) or as obedience to Allah SWT’s commands to create a family that is mawaddah, sakinah and rahmah (in KHI), then It is necessary to formulate bisexual acts as a reason for divorce. Placement of bisexual norms as a pretext for divorce is suggested in three regulations, namely the Marriage Law, Marriage Regulation, and KHI with the following description:

1. Law Number 1 of 1974 concerning Marriage

Attempts to incorporate the norms governing that divorce can be filed on the pretext of bisexuality are in the change of authentic interpretation or part of Article 39 paragraph (2) letter a Explanation of Law Number 1 of 1974 concerning Marriage (Explanation of the Marriage Law) to become as follows:

"One of the parties commits adultery, same-sex adultery, or becomes a drunkard, addict, gambler, and so on which is difficult to cure."

The inclusion of the nomenclature of 'same-sex adultery' in this context is harmonization with suggestions or proposals for reformulation of Article 411A of the new Criminal Code as described in discussion A. The nomenclature of adultery or same-sex adultery hereby in the national legal system becomes consistent and unambiguous (multi-interpretation).

The attempt to include same-sex adultery in the Elucidation of the Marriage Law is understood as an extensive attempt at an authentic interpretation of the old Article 39 paragraph (2) of the Marriage Law. As
the law does not explicitly regulate the body, usually bisexuality as a reason for divorce is also included in the authentic interpretation.

2. Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage

As a subordinate legislation (executing regulation) of the Marriage Law, the PP on Marriage is actually more detailed, technical, and applicable norms as a reference for state administrators (in a broad sense) to enforce them. PP on Marriage cannot reduce or add new norms to the law that becomes its reference.

This understanding has so far directed Article 19 Government Regulation on Marriage to apply *mutatis mutandis* to all matters described in the authentic interpretation of Article 39 paragraph (2) of the Marriage Law. When the authentic interpretation of Article 39 paragraph (2) of the Marriage Law is reconstructed in such a way as to accommodate bisexuality as a reason for divorce, then naturally the provisions of Article 19 letter of the Government Regulation on Marriage also change with the following suggestions.

"Divorce can occur for the following reasons: (a) one of the parties commits adultery, same-sex adultery, or becomes a drunkard, addict, gambler, and so on which is difficult to cure."

*Presidential Instruction No. 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law*

The KHI basically also accommodates the reasons for divorce. It is regulated in Article 116 with the addition of the substance of the norms other than the same things in Article 39 paragraph (2) of the Marriage Law and Article 19 of the Government Regulation on Marriage, namely the husband’s violation of divorce and one of the parties who apostates.

Before referring to the proposed reformulation formula, we need to know that the KHI in terms of the form of regulations cannot be found in the type and hierarchy of legislation Article 7 paragraph (1) UU P3. In this regard, Maria Farida once explained that the power of laws and regulations that had been formed and were in force before the era of Law

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Number 10 of 2004 concerning the Formation of Legislation was in accordance with the institution that formed the regulations.\textsuperscript{51}

Based on the description above, at least it can be identified that the current KHI in the form of a Presidential Instruction is the same as a Presidential Regulation. Regardless of the suitability of the form of the KHI with the principle of forming good laws and regulations as set forth in Article 5 of Marriage Law. The KHI in terms of its historicity is the ijtihad of Indonesian scholars - or in other words, Indonesian jurisprudence - which is still the reference for judges in the religious courts. It is this starting point that causes legal reformulation to also occur in this regulation. Thus, the article 116 can be formulated as follow.

"Divorce can occur for reasons or reasons: (a) one of the parties commits adultery, same-sex adultery, or becomes a drunkard, addict, gambler and so on which is difficult to cure"

The KHI’s reformulation to include bisexuality as a reason for divorce in the household seems to have a very strong contextualization. It is understood if you look at the provisions of Article 116 letter k which even makes apostasy a reason for divorce. It can be understood that the original intent of allowing a divorce suit could be based on self-protection of religion (\textit{hifdz al-din}).

\textbf{Conclusion}

The main points of discussion that have been described in this article, ultimately lead to two conclusions. First, the normativity of bisexual acts of married couples from the perspective of critical legal teachings based on three approaches, namely trashing, deconstruction, and genealogy still has a liberal and individualist legal paradigm. This has had a negative impact on the construction of criminal and civil law related to bisexual husband-wife acts, so that the legal politics that are aspired to are difficult to materialize. Second, the reformulation of the law on bisexual acts of married couples in Indonesia is based on philosophical, juridical and sociological considerations. The results show that it is necessary to add provisions for same-sex adultery, both in the

New Criminal Code, the Marriage Law, the Government Regulation on Marriage, and the KHI.

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