

**Same-Sex Marriage: A Comparative Study of Indonesian, Netherlands, And American Legal Regulations and Their Socio-Legal Implications**

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***ABSTRACT***

*This research originates from the increasing global attention and public debate regarding same-sex marriage, which has sparked widespread controversy across various societies. The study seeks to provide a comparative analysis of the legal regulations on same-sex marriage in Indonesia, the Netherlands, and the United States, examining both their legal frameworks and the broader social implications that arise from them. Utilizing normative, comparative, and conceptual methodologies, the research investigates how each country approaches the issue based on its cultural norms, religious values, and constitutional commitments. In Indonesia, same-sex marriage remains unrecognized and is firmly rejected. The prevailing cultural and moral narratives in Indonesia reinforce the perception that marriage must be between a man and a woman, in accordance with religious teachings and traditional family structures. On the other hand, both the Netherlands and the United States have embraced stance by legalizing same-sex marriage. These countries view the issue through the lens of individual rights, equality before the law, and the protection of civil liberties. Their legal systems recognize same-sex unions as a fundamental expression of human dignity and freedom, aligning with broader commitments to human rights. The contrast between these legal approaches underscores how legal systems are profoundly shaped by a country's social context, ideology, and historical development. Therefore, the study highlights the importance of cultural relativism in law, emphasizing that legal interpretations and norms must be understood within the specific cultural and ideological contexts in which they exist.*

**Keywords :** Same-Sex Marriage, Cultural Relativism, Comparative Law.

## **A. INTRODUCTION**

The issue of marriage has always been a constantly evolving and increasingly complex issue each year. Recently, LGBT marriage has become a phenomenal issue, emerging and widely discussed by the public, along with the strengthening flow of information, transparency, freedom of expression, and human rights issues. While same-sex marriages were previously held in secret, they are no longer taboo for public display. Furthermore, several countries around the world have legalized same-sex marriage in the name of freedom and human rights, which must be upheld.<sup>1</sup>

Globalization and the modern era have made habits and actions and culture continues to develop and change. One of them is an in-depth discussion regarding the legalization of same-sex marriage including in Indonesia. With the controversy that arose, this clearly seen as a complex issue, especially in countries that rich in culture, and thick with morality and religion such as Indonesia.

The debate over how to respond to the phenomenon of same-sex marriage has sparked sharp differences of opinion, both within and between cultural, religious, and national communities. This dispute has even attracted global attention, including in official United Nations (UN) forums. This demonstrates that same-sex marriage is an issue with international scope.<sup>2</sup> The two main camps with differing views continue to try to influence public opinion and the policies of their respective countries so that their views are adopted as official policy. Although various literature studies conclude that Indonesia does not yet have legal regulations specifically governing same-sex marriage, this does not mean that discourse and debate on this issue are absent. Within Indonesia itself, discussions and clashes of ideas are ongoing. One example is the judicial review of several articles of the Criminal Code (KUHP) at the Constitutional Court, which relate to crimes against morality.<sup>3</sup> During the judicial review, there was a push to expand the scope of these articles to include criminalization of same-sex marriage. The trial clearly demonstrated the clash of arguments between those in favor and those opposed to the legalization of same-sex marriage.

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<sup>1</sup>Rohmawati, “Perkawinan Lesbian, Gay, Biseksual dan Transgender/Transeksual (LGBT) Perspektif Hukum Islam,” *Jurnal Ahkam* 4, no 2 (2016): 306.

<sup>2</sup>Juneau Gary and Neal S. Rubin, “Are LGBT Rights Human Rights? Recent Developments at The United Nations,” *American Psychological Association*, June 2012.

<sup>3</sup>Mahkamah Konstitusi Republik Indonesia, “Pasal Zina dalam KUHP Digugat,” Juni 2016. <https://www.mkri.id/index.php?page=web.Berita&id=13167&menu=2>

There are significant differences between countries that recognize same-sex marriage and those that don't. The United States and the Netherlands are among the few countries that practice same-sex marriage. These differing views reflect the diversity of life, including how global society utilizes the institution of marriage and individual rights. The existence of same-sex marriage is a complex debate, filled with cultural, religious, and political nuances. Indonesia is more familiar with the terms Lesbian, Gay, Bisexual, and Transgender, or LGBT. The LGBT community brings a human rights perspective, emphasizing that human rights are a set of rights inherent in humans as creatures of God Almighty and a gift that is respected, upheld, and protected by the rule of law, in order to protect human dignity.

Unlike Indonesia, the decisions of the United States and the Netherlands to legalize same-sex marriage have significant implications, not only nationally but also internationally. This step demonstrates the development of a more inclusive and accepting society. The legalization of same-sex marriage has significant implications for individual rights, officially recognizing the relationships and emotional bonds between same-sex couples, and providing the same legal and financial protections as heterosexual couples.

Therefore, this paper aims to discuss the phenomenon of legalization of same-sex marriage which is currently a global issue, by reviewing and comparing legal regulations related to same-sex marriage in the United States, the Netherlands, and Indonesia, as well as analyzing its social and legal impacts. In addition, this paper will explore whether same-sex marriage can be considered part of universal human rights and therefore should be recognized and legalized by all countries, or conversely, whether it is more appropriate to be seen as an optional legal policy and depends on the decision of each country, in accordance with the cultural values, religions, and traditions that they uphold.

## **B. METHOD**

The method used in this research is a normative legal research method because it focuses on the study of legal documents, regulations, and legal decisions related to same-sex marriage in the United States, the Netherlands, and Indonesia. This research focuses on a literature review.<sup>4</sup> This research uses several approaches, namely; the legislative

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<sup>4</sup>Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, (Bandung: Citra Aditya Bakti, 2004), p.134.

approach, analyzes legal regulations related to same-sex marriage in three countries based on applicable laws and regulations; comparative approach, comparing regulations in the United States, the Netherlands, and Indonesia to find similarities and differences; and a conceptual approach, examines the concept of marriage, human rights, and legal implications from a legal perspective.<sup>5</sup>

### **C. ANALYSIS/DISCUSSION**

#### **Legal Review of Same-Sex Marriage in Indonesia**

In Indonesia, same-sex marriages are not legally recognized and are declared legally invalid. This is affirmed in Law Number 1 of 1974 concerning Marriage, which defines marriage as a physical and spiritual bond between a man and a woman.<sup>6</sup> This definition reflects that the national legal system only recognizes heterosexual marriage. Furthermore, Article 2 paragraph (1) of the law states that a marriage is considered valid if it is conducted according to the laws of each religion and belief. Considering that all official religions in Indonesia—namely Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism—do not condone same-sex marriage, there is no normative religious basis that supports the legality of such relationships.<sup>7</sup>

From a constitutional perspective, the Constitutional Court through Decision Number 46/PUU-VIII/2010 emphasized that the main objective of the institution of marriage is to preserve offspring and build family values, which are inherently linked to the moral principles of society.<sup>8</sup> Then, implicitly in Decision Number 46/PUU-XIV/2016, this Decision marked the end of the legal process for the petition filed to criminalize the practice of same-sex marriage. In its consideration, the Court firmly rejected the petition, not because the substance of the petition was considered correct or because it supported the legalization of same-sex marriage in Indonesia, but because the Court considered itself without the constitutional authority to create new legal norms as requested by the Petitioner. This is in line with the Court's position as *negative legislator*, which only has

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<sup>5</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2011), p.95.

<sup>6</sup>Republic of Indonesia, *Law Number 1 of 1974 concerning Marriage, Article 1*.

<sup>7</sup>See Article 2 paragraph (1) of Law Number 1 of 1974, which requires marriage to be in accordance with religious law, while all religions in Indonesia reject same-sex marriage.

<sup>8</sup>Constitutional Court of the Republic of Indonesia, *Decision Number 46/PUU-VIII/2010 concerning the Status of Children Born Out of Wedlock*.

the authority to cancel legal norms that conflict with the constitution, not to create new norms as is the function of *positive legislator* which is the authority of the legislative body.<sup>9</sup> This demonstrates constitutional consistency in rejecting legal recognition of same-sex relationships.

In the development of national criminal law, the new Criminal Code, as stipulated in Law Number 1 of 2023, maintains heteronormative norms. While it does not explicitly criminalize same-sex relations, several articles regulating morality, such as Article 412, can implicitly restrict the expression of non-heterosexual relationships in public spaces.<sup>10</sup> On the other hand, sociologically, Indonesian society in general also shows opposition to the legalization of same-sex marriage. According to a 2019 Pew Research Center survey, over 90% of Indonesians expressed opposition to the recognition of such relationships. This indicates that opposition to same-sex marriage stems not only from legal norms but also from strong cultural and social values.

Despite this, LGBT groups in Indonesia continue to fight for their basic rights, including the right to non-discrimination and security. However, to date, these efforts have not succeeded in changing existing regulations. In some cases, same-sex couples seek alternative solutions through marriage in countries where it has been legalized. This practice is related to the provisions of Article 83 of the Civil Code, which recognizes the validity of marriages conducted abroad if they comply with the laws of the country where the marriage took place. Although Article 28 of the Civil Code states that a man can only marry one woman, this provision has been continued by the enactment of Law Number 1 of 1974. However, because there are no explicit sanctions in national law for violations of this norm, legal loopholes remain, including the opportunity to change citizenship to obtain legal recognition.<sup>11</sup>

Normatively, same-sex marriage is often associated with human rights, particularly the right to marry. However, in the Indonesian legal system, human rights are limited by principles of morality, religious values, and public order. Same-sex marriage is considered contrary to the principle of the One Almighty God and inconsistent with the natural union

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<sup>9</sup>Constitutional Court of the Republic of Indonesia, *Decision Number 46/PUU-XIV/2016 concerning Material Testing of Article 284, Article 285, and Article 292 of the Criminal Code*.

<sup>10</sup>Republic of Indonesia, *Law Number 1 of 2023 concerning the Criminal Code (KUHP)*.

<sup>11</sup>Aldhi Royan Nugraha et al., “Analisis Kekuatan Kepastian Hukum Perkawinan dalam Mengatur Fenomena Akalakalan Pasangan Sesama Jenis untuk Melaksanakan Perkawinan,” *Proceeding of Conference on Law and Social Studies*, PGRI Madiun University, Madiun, 2023.

of a man and a woman. Furthermore, the essential purpose of marriage from an Indonesian legal perspective is the formation of a family and the preservation of offspring, which biologically cannot be achieved in same-sex relationships. Therefore, a legally valid marriage is only one between a man and a woman, as stipulated in Article 1 of the Marriage Law.<sup>12</sup>

A number of human rights activists, including those from the SNH Advocacy Center, argue that the legalization of same-sex marriage in Indonesia is unconstitutional. The 1945 Constitution affirms the principle of Belief in One Almighty God as the fundamental principle of the state, which implies the need to uphold religious values in all laws and regulations. This view emerged in response to the euphoria of several Indonesian public figures who welcomed the United States Supreme Court's decision to legalize same-sex marriage. Although Indonesia is not a religious state, the principle of Belief in God remains the moral foundation of the state system. Therefore, the prohibition of same-sex marriage is seen as a form of protection for the fundamental values of the Indonesian nation.<sup>13</sup>

Thus, based on the national legal framework, constitution, criminal law, religious norms, and societal culture, Indonesia has consistently rejected the legalization of same-sex marriage. Any future changes will depend heavily on changes in social, political, and legal norms at the national level.

### **Legality of Same-Sex Marriage in the Netherlands**

The Netherlands was the first country to legalize same-sex marriage. On December 21, 2000, a bill officially legalizing same-sex marriage was passed. However, its implementation began on April 1, 2001. Dutch regulations regarding same-sex marriage are regulated in *Marriage Opening Act*. *Marriage Opening Act* is the official name of the law that legalizes same-sex marriage in the Netherlands. This is regulated in Article 1, paragraph 30 *Civil Code* which reads: “*A marriage can be entered into by two persons of different or same sex.*”<sup>14</sup>

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<sup>12</sup>Fanny Priscyllia, “Perkawinan Sejenis dalam Hukum Kodrat di Indonesia,” *Jatiswara* 37, no 2 (2022): p.161.

<sup>13</sup>Aisyah Nurjannah et al., “Penentangan Legalisasi Adanya Perkawinan Sesama Jenis dengan Menegakkan Prinsip Hak Asasi Manusia,” *Indigenous Knowledge* 2, no 2 (2023): p.181.

<sup>14</sup>*Burgerlijk Wetboek, Boek 1, Wet Openstelling Huwelijk*

Since the mid-1980s, gay rights activists in the Netherlands, led by Henk Krol, began demanding that the government legalize same-sex marriage. At that time, approximately 80% of the Dutch public expressed support for such marriages. In addition to demanding legal recognition of same-sex marriage, activists also called for same-sex couples to be granted the right to adopt children. Finally, on April 1, 2001, the Netherlands officially legalized same-sex marriage, becoming the first country in the world to grant legal recognition to this form of marriage.

In contemporary Western society, the view that romantic love is an essential part of an ideal marriage has developed. This idea is no longer confined to the West but is also beginning to influence other cultures around the world. As explained in the book *Appreciating Anthropology*, cross-cultural studies show that romanticism has become a global phenomenon. Western values regarding the importance of love in marriage are increasingly being disseminated through mass media and global migration flows. Nevertheless, in many non-Western societies, marriage is often seen as a collective interest of the social group, not simply an individual decision. In this context, marriage serves as a strategic tool for building social and political relationships between groups.<sup>15</sup>

The legality of same-sex marriage in the Netherlands can be viewed from an anthropological perspective, with the decision being based on Dutch culture and ethical values rooted in modern Western principles. Conversely, many countries in Asia and Africa reject legal recognition of same-sex marriage because their social structures still prioritize marriage as a means of maintaining social status. On the one hand, the Dutch court's decision is considered a breakthrough in promoting more comprehensive human rights protection.<sup>16</sup> However, on the other hand, this decision also sparked resistance, particularly from religious groups and conservatives who considered it contrary to ethical norms and religious law. Nevertheless, this decision has become a point of consideration for other countries, and to date, 38 have been recorded<sup>17</sup> of the 193 internationally recognized countries *de jure* by the UN<sup>18</sup> have fully legalized same-sex marriage throughout their jurisdictions.

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<sup>15</sup>Barbara Miller, *Appreciating Anthropology*, 2nd ed. (Boston: Pearson, 2008), p.117-119.

<sup>16</sup>Ahmad Ega Putra Dani dan Murry Darmoko, “Ketentuan Perkawinan Sesama Jenis di Indonesia dan Belanda,” *Judiciary: Journal of Law and Justice* 12, no 1 (2023): p.135.

<sup>17</sup>Human Rights Campaign, “Marriage Equality Around the World,” <https://www.hrc.org/resources/marriage-equality-around-the-world>

<sup>18</sup>United Nation, “About Us,” <https://www.un.org/en/about-us>



### **The Transformation of Same-Sex Marriage Law in the United States**

June 26, 2015, marked a significant moment in American history, especially for advocates of same-sex marriage legalization. On that day, the United States Supreme Court legalized same-sex marriage nationwide through a historic ruling in the case of *Obergefell v. Hodges*.<sup>19</sup>

Prior to this decision, there were still 14 states that legally prohibited same-sex marriage, including Alabama, Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, most of Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas.<sup>20</sup> However, after the Supreme Court ruling, same-sex marriage became legal in all states, and all local laws that contradicted the ruling automatically lost their legal force.

In its legal reasoning, the US Supreme Court held that state laws prohibiting same-sex marriage were contrary to the civil rights of citizens protected by the 14th Amendment to the US Constitution (specifically Article 1) which reads in full:

*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*<sup>21</sup>

The United States Supreme Court's decision in the case *Obergefell v Hodges* That is what perfected and completed the struggle of pro-LGBT groups to legalize same-sex marriage comprehensively in all regions of America.<sup>22</sup> Then, based on this decision, same-sex couples in the United States were declared to have the constitutional right to marry, which is based on the 14th amendment which guarantees equal protection under the law.

Verdict *Obergefell v. Hodges* (2015) marked the culmination of a long series of struggles by the pro-LGBT community in the United States. With this decision, the Court definitively declared that same-sex couples have a constitutional right to marry, and

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<sup>19</sup>Supreme Court of The United States, *Obergefell v Hodges*, 26 June 2015.

<sup>20</sup>VOA News, “*US Same-Sex Marriage Ruling Likely to Impact Other Countries*,” June 2015. <https://www.voanews.com/a/ap-us-same-sex-marriage-ruling-likely-to-impact-other-countries/2840511.html>

<sup>21</sup>United States Senate, *Fourteenth Amendment to the United States Constitution*.

<sup>22</sup>Hamid Chalid dan Arief Ainul Yaqin, “Perdebatan dan Fenomena Global Legalisasi Pernikahan Sesama Jenis: Studi Kasus Amerika Serikat, Singapura, dan Indonesia,” *Jurnal Konstitusi* 18, no 1 (2021): p.148.



consequently all state laws prohibiting such marriages were automatically invalidated. *Obergefell* This isn't the first victory for LGBT groups. Three previous landmark decisions paved the way.<sup>23</sup>

First, *Romer v. Evans* (1996) which overturned a Colorado rule that prevented LGBT people from obtaining protected status.<sup>24</sup> Second, *Lawrence v. Texas* (2003) which abolished “sodomy laws” in Texas and 13 other states, making same-sex sexual relations no longer a criminal offense.<sup>25</sup> Third, *United States v. Windsor* (2013) which overturned key portions of DOMA and opened up federal recognition of same-sex marriage.<sup>26</sup> The four decisions—*Romer*, *Lawrence*, *Windsor*, And *Obergefell*—collectively become a milestone (*landmark decisions*) affirming LGBT equality in America. This series of victories demonstrates that legal change doesn't happen overnight, but rather through the accumulation of judicial precedent over nearly two decades.

Looking further, efforts to reform the legal system to be more inclusive have been underway for a long time, but only saw significant results in the late 1990s, when courts began interpreting LGBT issues through the framework of equality and human rights. This trend coincided with similar progress in Europe: from the late 1990s to the 2000s, more and more European countries recognized or legalized same-sex marriage, demonstrating that movements in different parts of the world influence and inspire each other.<sup>27</sup>

In the United States, the shift in public attitudes was driven by the synergy of prominent individuals, human rights organizations, law firms, and the media. Their campaign emphasized that sexual orientation is a part of personal identity that should not be a basis for discrimination, and that same-sex marriage should be viewed as a fundamental right. This is what led to the pro-LGBT movement in America gaining ground and even a convincing legal victory with the issuance of the ruling *Obergefell v. Hodges* which legalized same-sex marriage throughout the United States.<sup>28</sup>

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<sup>23</sup>Legal Information Institute, “*Obergefell v. Hodges*,” February 2023. [https://www.law.cornell.edu/wex/obergefell\\_v.\\_hodges](https://www.law.cornell.edu/wex/obergefell_v._hodges)

<sup>24</sup>Supreme Court of The United States, *Romer v Evans*, 20 May 1996.

<sup>25</sup>Supreme Court of The United States, *Lawrence in Texas*, 26 June 2003.

<sup>26</sup>Supreme Court of The United States, *United States v Windsor*, 26 June 2013.

<sup>27</sup>Claudina Richards, “The Legal Recognition of Same-Sex Couple – The French Perspective,” *International and Comparative Law Quarterly* 51, no 2 (2002): p.307-308.

<sup>28</sup>Kompasiana, “Reasons America Legalized Same-Sex Marriage,” August 2015. <https://www.kompasiana.com/saumiere/55c1bd514f7a61de1839fde7/ alasan-amerika-melegalkan-pernikahan-sesama-jenis>

Human rights are a key pillar of pro-LGBT rhetoric. They highlight the discrimination and persecution often experienced based on sexual orientation, while emphasizing that equal protection under the law is a state obligation.<sup>29</sup> It was this advocacy strategy that ultimately changed public opinion and influenced the Supreme Court to issue a decision *Obergefell*, completing the process of legalizing same-sex marriage throughout the United States.

### **Comparative Analysis of Legal Regulations Regarding Same-Sex Marriage in Indonesia, the Netherlands, and the United States**

Indonesian legal policy firmly rejects the recognition of same-sex marriage. This is based on Law Number 1 of 1974 concerning Marriage, which in Article 1 states that marriage is “a physical and spiritual bond between a man and a woman.” In addition, Article 2 paragraph (1) stipulates that the validity of a marriage is determined by the religious law of each party, while all official religions in Indonesia do not recognize same-sex relationships.<sup>30</sup> Constitutional Court Decision No. 46/PUU-XIV/2016 further reinforces this position, stating that changing the legal definition of marriage is the responsibility of the legislators, not the Constitutional Court. Thus, the legal approach in Indonesia is influenced by the principles of divinity, cultural values, and social morality, all of which favor a heteronormative system.<sup>31</sup>

In contrast, the Netherlands became the first country in the world to legalize same-sex marriage through ratification. *Wet Openstelling Huwelijk* act in 2000, which came into effect on April 1, 2001. In Article 1:30 (Dutch Civil Code) states that “marriage can be performed by two people of different or the same sex.”<sup>32</sup> This decision emerged as a result of the struggle of pro-LGBTQ groups, who championed the principles of equal civil rights and individual freedoms. In the Netherlands, same-sex marriage is not only recognized but also comes with additional rights, such as childcare and social benefits, equal to those enjoyed by heterosexual couples. The country's liberal and secular culture has also

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<sup>29</sup>Kenneth Mck. Norrie, “Constitutional Challenges to Sexual Orientation Discrimination,” *International and Comparative Law Quarterly* 49, no 4 (2000): p.755-756.

<sup>30</sup>Republic of Indonesia, *Law Number 1 of 1974 concerning Marriage, Article 1 and 2 paragraph (1)*.

<sup>31</sup>Constitutional Court of the Republic of Indonesia, *Putusan No. 46/PUU-VIII/2010 And Putusan No. 46/PUU-XIV/2016*.

<sup>32</sup>*Burgerlijk Wetboek Boek 1, Wet Openstelling Huwelijk*

contributed to the public's acceptance of same-sex marriage as a human right.

In the United States, the legalization of same-sex marriage was determined by the Supreme Court's decision in the case of *Obergefell v. Hodges* on June 26, 2015. This ruling stated that the ban on same-sex marriage was contrary to the 14th Amendment to the US Constitution, specifically the clause regarding equal protection under the law (*equal protection clause*).<sup>33</sup> Previously, there had been disparity at the state level, with some recognizing and others prohibiting such marriages. The *Obergefell* ruling unified these policies, making same-sex marriage legal throughout the United States. This demonstrates that the US legal approach relies on the Constitution and judicial interpretation of the principle of equal rights for citizens.

A comparison of the three countries can be seen briefly in the following table:

No.	Country	Same-Sex Marital Status	Legal basis
1	Indonesia	Not recognized	Law No. 1 of 1974 in conjunction with Law No. 16 of 2019; Constitutional Court Decisions No. 46/PUU-VIII/2010 & No. 46/PUU-XIV/2016
2	Dutch	Legally Recognized Since 2001	<i>Opening Up Marriage Act</i> ; Article 1:30 <i>Burgerlijk Wetboek Boek</i>
3	United States of America	Legally Recognized Since 2015	<i>Obergefell v. Hodges</i> (2015); 14th Amendment to the United States Constitution

A comparison of these three countries demonstrates a spectrum of legal approaches to same-sex marriage, based on their respective legal, political, and cultural foundations. Indonesia is grounded in religious law and social morality, which view marriage as a means of preserving progeny and divine values. The Netherlands positions marriage as a civil contract emphasizing individual freedom and equal rights, while the United States adopts a constitutional approach that universally protects the civil rights of its citizens through judicial mechanisms. Thus, the legalization or prohibition of same-sex marriage in each country reflects not only the content of formal laws but also the dynamics of social, political, and cultural values that shape its legal system.

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<sup>33</sup>Supreme Court of The United States, *Obergefell v Hodges*, 26 June 2015.

## **Social and Legal Implications of Same-Sex Marriage Policy in Indonesia, the Netherlands, and the United States**

In Indonesia, policies that deny recognition of same-sex marriage have a significant impact on the LGBT community. Due to the lack of formal legality, same-sex couples face discrimination in access to civil rights such as inheritance, healthcare, and social security. This social rejection is reinforced by dominant religious and cultural values, which view same-sex relationships as a moral deviation. A 2020 Pew Research Center survey showed that over 90% of Indonesians oppose the legalization of same-sex marriage.<sup>34</sup> This rejection also strengthens the marginalization of LGBT groups in social life.

From a legal perspective, Law No. 1 of 1974 concerning Marriage defines marriage as a union between a man and a woman. The lack of recognition of same-sex couples results in them losing legal legitimacy. Constitutional Court Decision No. 46/PUU-XIV/2016 emphasized that the legalization of same-sex marriage is the domain of lawmakers, not judicial institutions. The latest Criminal Code (Law No. 1 of 2023) also contains articles on morality, such as Article 412, which can be used to restrict the expression of same-sex relationships in public spaces. The lack of legal protection for LGBT couples poses a major challenge in the context of human rights in Indonesia.

In the Netherlands, the legalization of same-sex marriage since 2001 has had a positive social impact. Dutch society, which tends to be liberal and secular, demonstrates a high level of acceptance of same-sex couples. This legalization facilitates the social integration of LGBT groups, reduces discrimination, and increases inclusiveness in family and community life. The rights of same-sex couples, including the right to adopt children, are fully recognized and equal to those of heterosexual couples.<sup>35</sup> This reflects the successful integration of equality norms into the Dutch social structure.

Legally, recognition of same-sex marriage is regulated in *Civil Code* Article 1:30, which states that marriage can be entered into by two people, either of the same or different sex. Same-sex marriage also has constitutional protection. The Dutch constitution, Article 1, states that “all persons in the Netherlands must be treated equally”

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<sup>34</sup>Pew Research Center, “*The Global Divide on Homosexuality Persists*,” 2020 <https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/>

<sup>35</sup>Government of the Netherlands, *LGBTI Equality in the Netherlands*, (2018), p.4-5.

and prohibits discrimination on any basis. This policy ensures that same-sex couples receive equal legal protection in employment, access to goods and services, professional employment, membership of trade unions or professional associations, and the right to social protection, which in this case includes aspects of inheritance, as well as family rights.<sup>36</sup> The Netherlands is a global benchmark in legal protection for LGBT couples, reflecting the country's commitment to the principles of non-discrimination and human rights.

In the United States, the legalization of same-sex marriage through a ruling *Obergefell v. Hodges* The year 2015 triggered a major shift in social dynamics. In liberal states, the public responded positively to legalization. However, in some conservative states, social resistance remained strong, particularly from religious groups who oppose same-sex marriage on the basis of moral convictions.<sup>37</sup> Differences in cultural and political backgrounds have caused social acceptance of same-sex marriage in the US to be uneven.

Legally, the US Supreme Court's decision was based on the 14th Amendment to the US Constitution. This ruling ensures that all states must recognize and provide equal legal protection to same-sex couples. Rights such as inheritance, adoption, foster care, alimony, and social security are now equally available to them. However, challenges remain, particularly regarding claims of religious freedom used as a basis for denying services to LGBT couples. This demonstrates the ongoing legal and social struggles that characterize the US government's efforts to ensure the continuity of the democratic process in the country.<sup>38</sup>

### **Indonesia and Cultural Relativism in Its Law on Same-Sex Marriage Policy**

Within the framework of the theory of cultural relativism in law, each country's legal system must be understood within the context of its culture, social values, and societal beliefs. Cultural relativism rejects a universalistic approach to law that imposes external values onto a society without considering the underlying social foundations. In this context, Indonesia's position as a predominantly religious society that upholds the

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<sup>36</sup>Government of the Netherlands, *LGBTI Equality...*, p.4.

<sup>37</sup>Amaliatul Izzah, *Penolakan Kelompok Agama terhadap Pernikahan Sesama Jenis di Amerika Serikat.*, (Thesis, University of Jember, 2016), p.162.

<sup>38</sup>Amaliatul Izzah, *Penolakan Kelompok Agama terhadap Pernikahan Sesama Jenis ...*, p.163.

value of heterosexual-based families means that the current regulations, which only recognize marriage between a man and a woman, reflect living law in society. This is in line with what Eugen Ehrlich, a legal sociologist, said, who stated that “living law” often have a stronger influence on people's behavior than laws written in statutes.<sup>39</sup>

Indonesia's rejection of the legal recognition of same-sex marriage can also be justified normatively and theologically, especially from the perspective of Islamic law, which is an important source of law in Indonesia *maqashid sharia*, or the main objectives of Islamic Sharia, there are five basic principles that must be maintained: *hifz al-din* (keeping religion), *hifz al-nafs* (keeping the soul), *hifz al-'aql* (keeping sense), *hifz al-nasl* (taking care of offspring), and *hifz al-mal* (protecting property). Same-sex marriage is considered to be contrary to *hifz al-nasl*, because it does not allow for biological offspring to occur in this relationship. In addition, it is also considered to be inconsistent with *hifz al-din* and *hifz al-nafs*, because this practice in Islamic law is considered a violation of sharia and morality.

Legal policies in countries like the Netherlands and the United States, while valid within their legal systems, cannot be used as absolute guidelines for Indonesia because the core values embraced by each country are fundamentally different. Their liberal and secular approaches are irrelevant for application in a country like Indonesia, which, based on Pancasila and the 1945 Constitution, upholds the principle of Belief in One Almighty God.<sup>40</sup> In this regard, maintaining the law against same-sex marriage is a form of respect for the constitution and national identity. In fact, if necessary, Indonesia should draft stricter regulations, not only to clarify its opposition to same-sex marriage but also to prevent legal loopholes that could be exploited by certain parties.

Thus, Indonesia's legal position of not recognizing same-sex marriage is not a violation of human rights, but rather an expression of national legal sovereignty rooted in culture, religion, and the constitution. In the context of cultural relativism and *maqashid sharia* This policy actually reflects the state's efforts to maintain the social and moral stability of its society. Therefore, rather than blindly following the tide of legal globalization, Indonesia needs to strengthen its position by establishing specific

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<sup>39</sup>Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter Moll (Cambridge: Harvard University Press, 1936), p.493.

<sup>40</sup>Republic of Indonesia, *The 1945 Constitution of the Republic of Indonesia, Preamble and Article 29 paragraph (1)*.

regulations that explicitly prohibit and limit the legal recognition of same-sex relationships. This step is crucial not only to maintain the character of national law but also to protect the values that underpin national and state life.

#### **D. CONCLUSION**

A comparison of laws regarding same-sex marriage in the United States, the Netherlands, and Indonesia reveals fundamental differences in their approaches and values. The Netherlands has recognized and regulated same-sex marriage since 2001, while the United States legalized it nationally through a Supreme Court ruling in 2015. Both countries base their laws on the principles of equality and non-discrimination, in line with their shared commitment to human rights protection. Indonesia, on the other hand, explicitly does not recognize same-sex marriage, with regulations still heavily influenced by religious, cultural, and moral norms. This reflects the importance of understanding the social and political background in formulating legal policies on sensitive issues such as same-sex marriage. To protect the values of national and state life, Indonesia should reject this practice.



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