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Appendix 1



HRW.org

September 11, 2017

Nila Moeloek
Minister of Health
Ministry of Health
Republic of Indonesia

Re: Indonesian Mental Health Standards and LGBT People

Dear Minister Moeloek:

I write in advance of your keynote address at the Association of Southeast Asian Nations (ASEAN) Regional Union of Psychological Societies Congress (ARUPS) on October 12 to encourage you to speak out against the Indonesian Psychiatrists Association's (PDSKJI) harmful and scientifically inaccurate portrayal of the lesbian, gay, bisexual, and transgender (LGBT) community in Indonesia. In particular, my colleagues and I remain concerned about the PDSKJI's depiction of the LGBT community as requiring psychiatric treatment for their sexual orientation and gender identity.

Human Rights Watch is a nongovernmental organization that investigates and reports on human rights abuses in over 90 countries. For three decades we have researched, reported on, and sought to improve the human rights situation in Indonesia.

As we discussed when we met on April 11, 2016 at your office, the PDSKJI on February 19, 2016 stated that "people who are homosexual and bisexual are categorized as people with psychiatric problems," and "a person who is transsexual is categorized as a person with a mental disorder (ODGJ)." During our meeting, you expressed surprise and dismay that Dr. Fidiansjah had supported such a position. We encourage you to express your public support similarly at the ARUPS conference.

The views of the PDSKJI on this matter are misinformed, out of step with international scientific practices, and can instigate and incite violence against LGBT people. They also run counter to LGBT non-discrimination standards of many ASEAN mental health professional bodies and peer institutions around the world.

The World Health Organization removed homosexuality from its International Classification of Diseases in 1990. In addition, as reflected in the resources

attached to this letter, national mental health organizations in Turkey, Lebanon, Hong Kong, Thailand, India, South Africa, Brazil, the Philippines, and Argentina, among many others, reject the categorization of LGBT identities as mental health conditions.

As host of an important regional mental health gathering, Indonesia should affirm its place in the intellectual mainstream of scientific medicine and its international human rights obligations.

We urge you to use the ARUPS Congress as an opportunity publicly rejecting the Indonesian Psychiatrists Association's assertion that equates homosexuality and transgender identities with mental health conditions and pledge to make health services in Indonesia accessible and affirming to everyone.

We would appreciate learning what steps you have taken in this regard.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenneth Roth', with a large, sweeping flourish extending from the end of the signature.

Kenneth Roth
Executive Director

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Appendix 2

May 27, 2017

General Pol. Drs. H.M. Tito Karnavian
National Police Headquarters
Jl. Trunojoyo No. 3
KebayoranBaru
Jakarta Selatan 12110
Indonesia



HRW.org

Re: Raids against LGBT people

Your Excellency:

We write to express concern about a pattern of police action against lesbian, gay, bisexual, and transgender (LGBT) people in Indonesia that is both discriminatory and undermines the fundamental right to privacy. This is evident in recent police raids in Surabaya and Jakarta and in a recent statement by the West Java police chief.

Human Rights Watch is an international nongovernmental organization that investigates and reports on human rights abuses in over 90 countries. We have worked on a range of human rights issues in Indonesia for nearly three decades.

On April 30, 2017, police raided a private gathering of gay and bisexual men in Surabaya, arrested 14 men, detaining and subjecting them to HIV tests without their consent.¹⁵³ On May 21, police raided the Atlantis Spa in Jakarta, arrested 141 people, and charged 10 for holding an alleged sex party. Officers allegedly paraded the suspects naked in front of media, and interrogated them while they remained unclothed, though the police deny this. Both police raids were carried out under the pretext of the 2008 Anti-Pornography law. This law is discriminatory in content as it specifically includes “lesbian sex” and “male homosexual sex” as “deviant sexual acts,” alongside sex with corpses and sex with animals. This contravenes international human rights law applicable to Indonesia, as it expressly discriminates against gay men and lesbians. It is also contrary to the World Health Organization, which regards same-sex orientation as a normal variant of human sexuality.

The police’s use of this law as a pretext to raid private gatherings allows for the discriminatory targeting of Indonesia’s already-beleaguered LGBT population. Privacy rights are a fundamental protection that underlie everyone’s physical

¹⁵³ Human Rights Watch, “Indonesia: ‘Gay Porn’ Arrests Threaten Privacy,” May 4, 2017, <https://www.hrw.org/news/2017/05/04/indonesia-gay-porn-arrests-threaten-privacy>

autonomy and identity. The United Nations Human Rights Committee, the independent body of experts that interprets the International Covenant on Civil and Political Rights, to which Indonesia is party, has stated: “It is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy.’”

We are also deeply concerned that Inspector General Anton Charliyan, the West Java police chief, announced plans on May 24 to create a special unit within the police force to detect and punish LGBT people. Charliyan’s statement disturbingly echoes Banda Aceh mayor Illiza Sa’aduddin, who announced in February 2016 that she would create a “special team” to make the public more aware of the “threat of LGBT,” and to “train” LGBT people to “return to a normal life.”¹⁵⁴

Your office is obligated to uphold the basic rights of all people in your jurisdiction without discrimination. We urge you to act swiftly to ensure that LGBT people are not targeted by the police and that their fundamental human rights, including the right to privacy, are upheld. This is in line with President Jokowi’s October 2016 statement that “the police must act” against any moves by bigoted groups or individuals to harm LGBT people or deny them their rights, and that “there should be no discrimination against anyone.”¹⁵⁵

We request that you initiate an investigation into the procedures that led to the raids, and the behavior of the officers during the raids—including their alleged exposure of the detainees’ identities in the media. We urge you to reaffirm publicly that the National Police of Indonesia will protect everyone’s basic rights regardless of their sexual orientation or gender identity.

We would be happy to meet with you to discuss these issues further.

Sincerely,

Brad Adams
Asia Director

CC: President Joko ‘Jokowi’ Widodo

¹⁵⁴ Serambi Indonesia, “Pemko Bentuk Tim Pencegahan LGBT,” February 27, 2016, <http://aceh.tribunnews.com/2016/02/27/pemko-bentuk-tim-pencegahan-lgbt>

¹⁵⁵ Human Rights Watch, “Indonesia President Jokowi Defends LGBT Rights,” October 20, 2016, <https://www.hrw.org/news/2016/10/20/indonesia-president-jokowi-defends-lgbt-rights>

Appendix 3

Constitutional Court judgment in Case No. 46/PUU-XIV/2016.¹⁵⁶

Explanation from judge panel member Saldi Isra

The main legality principle is derived from four elements, which are:

- a. Norms regulating criminal laws should not be applied in a retroactive manner (berlaku surut);
- b. The actions prohibited, along with the punishment that could be applied to the prohibited action should be explicitly written in a law document;
- c. It is prohibited to apply unwritten law in criminal laws. It is also prohibited to punish a person according to a particular law when the norms regulating the written law regarding the criminal act is not defined clearly;
- d. The conditions covered by criminal laws have to be interpreted within strict boundaries; therefore, it is prohibited to use analogies in criminal laws.

Taking into consideration the four elements of the legality principle mentioned above, when we look at the petition and inferring the consequences of ruling in favor of the petition, we now raise a question: will the Constitutional Court's decision in this context fulfill the four elements contained in the legality principle mentioned above?

In criminal law definition, the term "law" covering the four elements of the legality principle refers to a written legal product created by lawmakers (in Indonesia they cover the House of Representatives members and the President). By definition, it is a legal product born out of criminal policies.

Keeping the definition in mind, let us infer the consequences should we rule in favor of the petition, with the assumption that the court's ruling is equal to the law itself. The ruling might have fulfilled the first three elements of the legality principle mentioned above, but it will fail to fulfill the fourth one, because of the prohibition to use analogy in a legal product. Taking into consideration this prohibition, is it appropriate for a court which puts

¹⁵⁶ This is a translated version of the Constitutional Court's judgment in case no. 46/PUU-XIV/2016. The original version can be found here: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/46_PUU-XIV_2016.pdf

norms into trial to expand the meaning contained within criminal law norms, which are the result of criminal policies created by the lawmakers?

Once again, this is important because this ruling is intrinsically related to a criminal law – where judges have to apply the legality principle in a strict manner.

After all, just because materials concerning a legal norm do not contain complete definitions which cover or accommodate the contemporary society's growing aspirations, it does not mean that the legal norms run contrary to the 1945 Indonesian Constitution, let alone in the field of criminal law.

Explanation from judge panel member Maria Farida Indrati

When it comes to criminal law norms, the court is obliged not to enter criminal policies. The court cannot grant judicial review requests based on petitions seeking to criminalize (or decriminalize) particular actions or behaviors, because such [requests and petitions] seek to curtail an individual's rights and freedoms which, according to the 1945 Indonesian Constitution's Chapter 28J (2), is an exclusive authority of the lawmakers.

It is very important to emphasize that the authority over criminal policies lay exclusively within the lawmakers. Different from other legal fields, criminal laws – with harsh punishments that come with them – could potentially confiscate someone else's freedom and even take away someone else's life. Therefore, the state's legitimacy to define actions and behaviors that should be prohibited and placed under threats of legal punishment, along with the types of punishments that could be imposed on such actions or behaviors should be constructed based on the constituents' consent, which is represented by the state's lawmaking instruments (the House of Representatives members and the President, both of which are elected directly by their constituents), not through the ruling of a judge panel or a trial. An individual's rights and freedoms can be curtailed only through law. True to this underlying logic, Law No. 12/2011 on Lawmaking's Chapter 15 makes it clear that criminal policy contents could be contained in only legal products that are approved by lawmakers in House of Representatives and the Legislative Council, such as a Law or a Regional Regulation.

The court, meanwhile, is tasked to conduct judicial reviews on whether the curtailment on an individual's freedom as imposed by a particular Law is consistent with the constitution or, on the contrary, goes beyond the limits set by the constitution.

Therefore, in cases related to criminal laws, so far the court has received more judicial review requests seeking to decriminalize [than to criminalize] certain actions or behaviors as regulated in the Laws because the criminalization of the actions and behaviors are seen to run contrary to [the protection of] basic human rights and the constituents' constitutional rights and thereby has to be judicially reviewed by the court because the court's judicial review authority is indeed aimed at protecting citizens' constitutional freedoms to keep them from being violated by criminalization policies created by Lawmakers.

Therefore, although the lawmakers have an authority to apply criminalization policies, they have to be extremely careful in doing so. The lawmakers have to pay careful attention not only to the legal developments that occur in the Indonesian society as a result of not only the Indonesian people's worldview but also the legal developments that take place globally.

The national legal renewal symposium, which took place in August 1980 in Semarang, Central Java, recommended several general criteria that should be taken into consideration in forming criminalization policies upon certain actions or behaviors. The criteria are:

- a. Whether the actions or behaviors are disliked or despised by the general public because they result in certain losses, or potential losses; because they victimize or could potentially victimize others;
- b. Whether the cost of criminalizing a person would be worth the result of doing so. The term 'cost' here covers the cost of making the law, its supervision and enforcement, as well as the human cost: whether the burden which both victims and perpetrators of the crime has to bear will be in equity with the condition of legal order achieved through the criminalization policy;
- c. Whether the criminalization policy will add to the workload of law enforcers – or in apparent reality could not be implemented by the law enforcers due to their limited capabilities;

- d. Whether the [criminalized] actions and behaviors prevent Indonesia from achieving its national goals and thereby posing a threat to the society as a whole.

The general criteria mentioned above obviously have to be assessed through several aspects before they are implemented. Assessment on the first criterion obviously intersects with aspects of moral, custom and religious norms. In this case, representations from different religious and other denomination groups in Indonesia have to give their approval and consent in assessing the criminalization policy.

The second criterion, meanwhile, has to be fulfilled by making meticulous calculations on the impacts of criminalizing a particular action or behavior. The third criterion has to be fulfilled by taking into consideration the workload of law enforcers should an action or behavior be classified as a criminal one. The fourth criterion has to be assessed through adequate anticipation on the consequences that will occur as a result of criminalizing an action or behavior, so that the balance between individual and societal rights could be maintained.

Upon conducting careful judicial review, it is also apparent that the petitioners have an assumption that all social phenomena considered as ‘deviant’ [premarital sex and same-sex relationship] by them that occur in society – even the majority of the nation’s big problems – will effectively be solved through criminal policies that punish individuals who act on it criminally.

When we look at this paradigm implied by the petitioners, we have to be mindful that legal measures comprise only one element of aspects regulating our social life to create and maintain societal order. We have other social regulatory tools, which include morality, courtesy and religious values. Legal measures are placed last in line among these tools. The role of law in maintaining societal life and its order will be much more effective when elements of the society comply with moral, courtesy and religious norms because they are intrinsically aware that these norms are necessary. In terms of the legal field, criminal policies are also placed last in its order of priority in upholding and maintaining societal order, which means that criminal law will be taken as a measure to uphold societal order when moral, courtesy and religious norms have failed in doing so.

Therefore, criminal law is said to be the ‘last remedy’ (ultimum remedium). Therefore, it is out of proportion to place all the responsibility in arranging social phenomena – especially regulating behaviors considered ‘deviant’ to criminal policies only.

Because not all roots of all societal problems can be traced back to weak legal norms – in particular, criminal laws – thereby, the remedy required to overcome the problems goes beyond legal measures – especially criminal laws – only.

If one builds an argument that to maintain societal order is to force members of the society who acts in a manner considered deviant to change their behaviors through threats of criminal punishment, he or she basically believes that societal order can be created under repressive measures only. Suppose this assumption is true then the societal order that comes out of such repressive measures will be only an artificial kind of order. Because the compliance resulting in genuine societal order will come only out of individual moral consciousness, not out of fear of punishment threats.

Conclusion

Based on the assessments on the facts as well as legal principles outlined above, the court has made the following conclusions:

1. The court is authorized to adjudicate the abovementioned petition;
2. The petitioners have a legal right to file the abovementioned petition;
3. The petition’s main reasoning is legally unsound.

Therefore, the court has decided to reject the petitioners’ request altogether.

Dissenting opinions

Four constitutional judges – Arief Hidayat, Anwar Usman, Wahiduddin Adams and Aswanto – have voiced their dissenting opinions on the court ruling.

Dissenting opinion from constitutional judge Aswanto

[The national ideology of] Pancasila (the Five Principles) is the source of all of Indonesia’s legal products. The five principles themselves are outlined in the fourth paragraph of the preamble to the 1945 Constitution. To place Pancasila as the nation’s philosophical

foundation and ideology means not to have any legal policy materials that run contrary to the values contained within the five principles.

In Pancasila, the Godly value [nilai ketuhanan] as embodied in the first principle of belief in one God carries the utmost importance, because it is related to an absolute [religious] value. All values of goodness are derived from this [religious or Godly] value. A conduct can be judged to be a 'good' one if it does not run contrary to God's values, rules and laws. In Jimly Asshiddiqie's view, faith in and compliance to One God distinguish an individual's quality and stature among his or her peers so that the societal and national life could evolve healthily in a just social structure, thereby helping a nation's civilization quality to increase respectably among other nations.

The Godly values as mandated by Pancasila, to borrow former president Sukarno's expression, consist of cultural and civil Godly values. This means that the Godly ethical values are being excavated from the prophetic values of the nation's religions and beliefs which are by default liberating, venerating justice, a sense of Godly universal humanity as well as tolerant, which inspire citizens to collaborate with one another according to social ethics regulating societal and national life. In line with the rationale, former vice president M. Hatta said that the 'belief in one God' principle serves as a foundation which leads [Indonesians] to truth, justice, goodness, honesty and fraternity. The principle invites Indonesians to develop a social ethics in their public and political lives to foster a sense of humanity and unity, while nurturing social consensus and justice.

Based on the abovementioned interpretation of the principle, belief in one God is a principle that not only seeps into an individual religious adherent's faith but also a life principle governing communal life in a nation surrounded by religiously diverse communities.

Indonesia's founding fathers do not define the 'belief in one God' principle as merely philosophical or theological concept – nor did they present it as a scientific concept based on a particular religious or philosophical conception – but a principle that should be practiced in people's daily lives. The principle can be practiced in an individual's day-to-day life, for instance, by behaving in a just manner to one's fellow human beings, speaking and acting honestly and nurturing social ties. All the behaviors previously mentioned

should seek to avoid disintegration among people. The values lay the foundation for a proper nationhood.

The 1945 Constitution's chapter 28) outlines that it is a Godly constitution [konstitusi berketuhanan], which places emphasis on religious and public order values as moral codes that lawmakers should obey in formulating legal norms, so in times where legal norms which reduce, restrict, violate boundaries and/or run contrary to religious values, then the legal norms have to be adjusted so that it does not run contrary to religious values and Godly teachings.

Therefore, it becomes clear that the Criminal Code's chapter 284 criminalizes and penalizes only extramarital affairs based on reports filed by a partner. The abovementioned paradigm and philosophy clearly restrict and run contrary to religious values; they also give no room to religious values and Godly enlightenment [sinar ketuhanan] which act as living laws governing the Indonesian society since the old days which perceives extramarital sex as a disgraceful behavior because the behavior runs contrary to the living laws and religious values which stipulate that sexual intercourse can be enjoyed by only men and women who are already married.

Once again, the values and laws have governed how Indonesians conduct themselves since the old days. In the Indonesian archipelago's societal life, even long before the Dutch colonists implemented its book of criminal code (Wetboek van Strafrecht), adultery or extramarital sex had already been seen as a highly ignoble behavior [...] because when we look at sociological and anthropological viewpoints, the lives of Indonesians comprise various religious affiliations and ethnic groups which identified the societal life with more communal and religious characteristics than those of individualism and secularism. Therefore, any disgraceful behaviors conducted by an individual, especially casual sex [zina] – be it in the form of adultery or fornication – always bring about negative impacts on the communal life. The Indonesian society regards the community to be superior to the individual, because an individual is not alienated from his or her social fabric.

All religious teachings which are being spread in Indonesia also view adultery and fornication in a highly disgraceful light. In Islam, for example, God outlines this explicit prohibition against adultery and fornication as written in Koran's chapter 17 (surah al-Isra), verse 32: "in truth, casual sex is a violent action and a bad conduct".

Furthermore, the application of the Criminal Code's chapter 284, which prohibits casual sex in the form of extramarital sex only [and not fornication], is a practice of colonial citizen segregation based on marital status and assigned sex (jenis kelamin). This runs contrary to the religious values and living laws of Indonesians.

Dissenting opinion from constitutional judge Wahiduddin Adams

If the constitutional court continues to reduce or restrict religious-based legal norms, then [...] the court in actuality has allowed laws and court rulings to contain legal norms that are not enlightened by, and even go against, religious values and Godly wisdom [sinar ketuhanan], while in fact the court [...] has long shown its support to the idea that casual sex, be it adultery or fornication, covers a public criminal law element necessary to maintain order.

In terms of criminalization, we agree that the court should take judicial restraint in order not to expand the definition of a criminal act, but a problem ensues when a legal norm, as has previously been discussed, has clearly been shown to run counter to religious norms and Godly enlightenment, both of which are imposed to maintain human order and welfare. Both adultery and fornication are, as the Koran and other Holy Books has outlined, intrinsically disgraceful. A nation does not require public consent as a sine qua non element in criminalizing an offensive behavior that should be prohibited.

Therefore, the court has to engage in ijtihad (independent juristic reasoning) by interpreting the constitution through the moral lens instead of committing judicial restraint [in this case]. By restricting the definition of casual sex to only adultery, as the Criminal Code's chapter 284 outlines, is obviously an attempt to strip the law off its spiritual component [despiritualisasi hukum] because according to religious teachings – which are referred to by the constitution as a necessary guidance in formulating legal norms – sexual intercourse can be done only between men and women who have been tied in a marriage institution.

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Appendix 4



HRW.org

February 9, 2018

Dr. Nila Moeloek
Minister of Health
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Jakarta 12950
Tel. +62-21-5201590
Fax. +62-21-52921669

Re: Ministry's position on homosexuality as a "psychiatric disorder"

Dear Minister Moeloek:

I write concerning recent reports that Indonesia's Ministry of Health has prepared a report that recommends the introduction of a diagnosis for homosexuality as a "psychiatric disorder."

On February 16, 2016, Dr. Fidiansjah, a psychiatrist and the director of mental health at the Ministry of Health, stated during a live television program that homosexuality is a "psychiatric disorder." Three days later, on February 19, the Indonesian Psychiatrists Association (PDSKJI), where Fidiansjah is a board member, issued a notice stating that "people who are homosexual and bisexual are categorized as people with psychiatric problems."

As you and I discussed when we met on April 11, 2016 at your office, Dr. Fidiansjah's comment and PDKSJI's February 19 statement are deeply problematic and run counter to international scientific consensus and human rights standards. Three weeks earlier, on March 24, you told the *Jakarta Post* that you planned to investigate Fidiansjah's comment. During our meeting, when I raised the issue, you expressed surprise and dismay that Dr. Fidiansjah had supported such a position but without indicating that an investigation was in fact underway.

Dr. Fidiansjah, now serving as the Director of Prevention and Control of Mental Health and Nutrition Problems for your ministry, told reporters last week that "LGBT is a mental health issue" and that the health ministry's job is to maintain "norms, religion, and culture."

As we communicated in previous correspondence and during our meeting in 2016, Human Rights Watch urges your office, which is entrusted to protect the health of the Indonesian people, to publicly condemn the PDKSJI statement as unscientific and discriminatory, and to reject the categorization of LGBT identities as mental health conditions. As reflected in the resources we shared previously and attach again to this letter (including statements from national mental health organizations in Turkey, Lebanon, Hong Kong, Thailand, India, South Africa, Brazil, the Philippines, and Argentina), the categorization of LGBT identities as mental health conditions would isolate Indonesia from global scientific medicine and fall short of Indonesia's international human rights obligations.

I hope your ministry will endorse the international consensus on this issue and reject contrary positions stated by Dr. Fidiansjah and PDSKJI. We would be grateful for a clear articulation of your position in response to archaic and discriminatory views.

Please share with my colleagues the most current draft of the ministry's report on this matter so that we may analyze the original text. They can be reached at Andreas.Harsono@hrw.org and Kyle.Knight@hrw.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenneth Roth', with a stylized flourish at the end.

Kenneth Roth
Executive Director