

Discourse on Legality of LGBT from the Perspective of Islamic Law and Indonesian Law

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Abstract

The existence of LGBT communities in Indonesia is getting massive. Several NGOs have been established to support and hold campaigns to take the rights of LGBT communities into account. Principally, Indonesia is not based on Islamic law that follows Islamic principles as its national law. However, Aceh is the only one of the state in Indonesia that complies with Sharia of Islam. To date, there has not been a single regulation of the state regulating LGBT, but eighty-five per cent of Indonesian people are Muslim and Islamic values that ban LGBT are still strongly held. This research is aimed to: (1) elaborate the discourse on the legality of LGBT and the trend that keeps growing within national law in Indonesia; and (2) to analyse the role and influence of Islamic law on national law that will be applied, and to analyse Islamic law that has taken into effect in Aceh for LGBT communities. This study is categorised into normative legal research with statute, conceptual, and analytical approaches, which were analysed by means of descriptive analysis.

Based on this research it is concluded that Indonesia has five principles (*Pancasila*) as the core ideology of the state, in which the highest principle states "Belief in the one and only God". Therefore, every regulation must not be against this principle. LGBT is a crime regulated in regional regulations and *Qanun* Aceh that is more local, while the national law in Indonesia has not formulated the regulation regarding LGBT as a crime. The influence of sharia Islam on and the role of sharia Islam in Indonesian national law over LGBT are regarded strong in *Qanun Jinayat* in Aceh.

Keywords: discourse, LGBT, Islamic law, Indonesian law.

Introduction

It is known that the population of gays, bisexuals, and transgenders in Indonesia is quite massive. According to survey by CIA back in 2015, the number of LGBT in Indonesia was in the top fifth in the world to that of China, India, Europe, and the US. Based on the data of the Ministry of Health of 2012, there were at least 1,096,970 gay people in Indonesia (Damhuri, 2018). The National Secretariat Coordinator of Gaya Warna Lentera Network¹ estimated that there were 800,000-3,000,000 MSMs² in Indonesia. Those numbers are apart from the total population of LGBT in Indonesia,

¹ An organisation dealing with health services related to HIV/AIDS and human rights for GWL community in Indonesia.

² The term MSM does not always refer to self-identified gay men. Some MSM have both male and female partners, and some are married to women with whom they have children. The term is used specifically to describe actions and not identity, and is usually used in the context of public health or medical studies. The term includes any men who have sex with other men, including those who engage in selling sex to other men as a primary or additional source of income.

lesbians, female bisexuals, transgender males, all of which are not easy to detect. Unlike the above figures, the numbers of cross dressers and MSMs are easier to obtain because of their importance as some of the key at-risk population for HIV/AIDS (Badgett, Hasenbush & Luhur, 2017, p. 3-4).

The movement of LGBT and its supporters occurs massively in Indonesia. This is caused by the emergence of fight-for-LGBT legalisation-based NGOs intending to acknowledge the rights of LGBT: Himpunan Wadam Djakarta (Hiwad)³ facilitated by a Marine General Ali Sadikin, Lamda, an organisation for Homosexuals established in 1982, Persatuan Lesbian Indonesia (Persalin) (United Lesbians of Indonesia) in 1986, Persaudaraan Gay Yogyakarta (PGY) (Gay Brotherhood of Yogyakarta) in 1985 changed to Gay Society in 1988, Swara Srikandi in 1990, Cross dressers and men having sexual intercourse with men (GWL-INA) in 2007. This movement is getting even stronger especially when LGBTIQ (lesbian, gay, bisexual, transgender, intersex and queer) was founded in Indonesia after the third international Conference of Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) held in Chiang Mai, Thailand in January 2008 (USAID and UNDP, 2013, p. 18).

It is not easy to welcome the movement and existence of LGBT in Indonesia, where its people still strongly cling on to Islamic values in their life. However, there has not been any national regulation that regulates LGBT hitherto. Early in 2016, debate over LGBT in Indonesia started to come to the surface after the Decision of Constitutional Court Number 46/PUU-XIV/2016 was made, rejecting the entire petition coming from petitioners calling for judicial review of Article 284, 285, and 292 of Criminal Code.⁴ The three articles reviewed successively regulate adultery, rape, and homosexuality in Paedophilia. The twelve people who proposed judicial review suggested that the three articles in the Criminal Code were unconstitutional and violated the constitutional rights of the petitioners. Related to Article 292 of Criminal Code, the petitioners have proposed a change in which the phrase 'male adults involved in any adultery act with under age children' should be amended to 'whoever is involved in adultery with others of the same sex'. In other words, this article is intended to be able to punish those involved in homosexual adultery.

³ Wadam/wanita adam is another term for 'sissy' which sounds more insulting. The term wadam changed into waria (cross dresser) in 1978 since Indonesian Council of Ulema (MUI) argued that this was inappropriate to use the name of the Prophet Adam as to identify a person who expressed himself more like a woman.

⁴ Article 284 (1) Criminal Code: sentenced with a maximum imprisonment of nine months:

1: a. a married man commits adultery while he is aware it is against Article 27 of BW;

b. a married woman commits adultery;

2: a. a man is involved in the adultery, while he is aware that the person involved in the indecency is married.

b. an unmarried woman is involved in the adultery while she is aware that the person involved in the indecency is married and Article 27 is applicable for her.

Article 285 of Criminal Code: "whoever forces a woman to have sex with a threat or violently out of marital tie is sentenced under the law regulating rape with a maximum imprisonment of twelve years."

Article 292 of Criminal Code: "A person old enough to commit adultery with another person of the same sex and underage, in which it is known or suspected, is sentenced to a maximum imprisonment of five years."

Principally, unlike in Aceh, Indonesia is not an Islamic state that puts Quran and Hadiths as its sources of law. LGBT in Aceh is strictly banned and regarded as a crime as regulated in Article 63 Paragraph (1), (2), and (3) *Qanun* Number 7 of 2014 on *Jinayat* Law that bans sexual intercourse between men and Article 64 Paragraph (1), (2), and (3) concerning *Musahahah* offense, adultery between women (lesbian).

LGBT from the Perspective of Islamic Law

Homosexuality is strictly and clearly banned in Islam by Allah SWT as in Surah Al A'raf: 80 – 81:

“And (we had sent) Lot when he said to his people, “Do you commit such immorality as no one has preceded you with from among the worlds? Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people.”

In Islam there are several terms concerning LGBT as follows: *liwath* is defined as homosexual/gay, *sihaq* as lesbianism, and *takhonnut-tarojjul* as tomboy-sissy behaviour. Lesbianism is referred to the discussion of *sihaw*, gay to *liwath*, bisexual to *liwath* or *sihaq*, and transgender tends to be in the category of sissy or tomboy act/*takhonnuts-tarojjul* (Rozikin, 2007, p. 11-12). *Liwath* is also regarded as *liwathoh/talawwuth/luthiyyah* referring to the act as done by the followers of the Prophet of Lot, while the perpetrator is called *luthi* (USAID and UNDP, 2013, p. 18).

The sanctions for *liwath* perpetrators may be varied and are not as clearly elaborated as those for adulterers (Siker, 2007, p. 7).⁵ In Hadith, Prophet Muhammad mentioned that whoever witnessed an act as committed by the followers of Prophet Lot, he or she had to kill the perpetrator and the one with whom the perpetrator had sex (Ibrahim, 2013, p. 1010)⁶. Other sources mention that perpetrators of *liwath* can be physically tortured, killed with sword and then burned, dropped from high places onto the ground, hit with wall, jailed in a rotten chamber, equalised to the sanctions imposed on adultery, and imposed with *ta'zir* (Rozikin, 2007, p. 73-96).

Sihaq/sahqun/mushahaqoh/tadaluk/sihaqiyah refers to lesbian/lesbianism (Rozikin, 2007, p. 165). A proposition concerning haram (forbidden) *sihaq* is known as ban of *ifdho'*, in which it was stated (no year given: 283): “A man must not look at another man's genital area, and it is also true for women. A man must not commit *ifdho* under the same blanket with another man, and it remains true for women.” *Ifdho* is defined as skin-to-skin intimacy. When *ifdho* is banned by the Prophet Muhammad SAW, *sihaq* is highly forbidden because this is more seriously unacceptable than *ifdho*. *Sihaq* means uncovering genital area without *haqq* (truth), touching with lust without *haqq*, and sexually stimulating another to perform *fahisyah*. Those have proven that *sihaq* is regarded as haram. Such an immoral act must be punishable by *ta'zir*, for this act is

⁵ Siker mentioned that in several Islamic countries like Saudi Arabia, Iran, Chechnya, Nigeria, and Pakistan, homosexuals were sentenced to death. Meanwhile, in Malaysia which is not an Islamic state, homosexuals were punishable by a maximum imprisonment of 20 years, and in Egypt where it was classed among “offence against public decency” homosexuals were punishable by five-year imprisonment.

⁶ In *Muttafaq'alaihi*. HR. Abu Dawud (no.4462), Shahih Sunan Abu Dawud (no.3745). HR. At-Tirmizi (no.1456), shahih Sunan At-Tirmizi (no.1177), as cited by Ta'zir the law relevant to provision given by Judge.

equal to the act of *mubasyaroh dunal farji* (defined as only making out without involving sexual intercourse), recalling that *sihaq* does not involve penetration. According to Al_jurri, ta'zir as a punishment is delivered by Ali by applying 100-time whip to the perpetrator of *sihaq*. Al-jurri mentioned that Ali bin Abi Thalib whipped them 100 times (Rozikin, 2007, p. 175-176).

The Trend in National Law concerning Legalisation of LGBT

The decision by Constitutional Court entirely rejects the proposal for judicial review regarding the amendment of Article 292 of Criminal Code punishing a male adult committing adultery to a child of the same sex. The Constitutional Court argues that its agreement to change the policy will only strengthen the belief that the Constitutional Court is regarded as Criminal Policy Maker. However, it is the responsibility of the state to make such a policy, while the Constitutional Court acts only as a Negative Legislator in reviewing Acts towards the Constitution. In other words, the Constitutional Court is only authorised to cancel an Act and is not authorised to make a law or regulation, for it is the authority of parliament (Constitutional Court Decision Number 46/PUU-XIV/2016, p. 444). Therefore, sexual intercourse between male adults is not considered as a crime.

The draft Criminal Code (session on February 24, 2017) has enacted Article 495 of draft Criminal Code concerning homosexuals:

- Whoever, predicted to be or known to be under 18 years old, is involved in an obscene act with another person of the same sex is punishable by nine-year imprisonment.
- Imposed with the same sanction added with one thirds when this is considered as an obscene act as intended in Paragraph (1) performed in oral or anal sex or in all forms of contact between non-genital and genital area by homosexuals.⁷

Article 495 of draft Criminal Code is not far different from the Criminal Code that applies at present time, in which the proportion of criminal sanctions is mentioned in Paragraph (1) and aggravating punishment is added as regulated in Paragraph (2) concerning obscene act committed to children by way of oral sex, anal sex, or any forms of contact between non-genital and genital done by homosexuals.

Homosexuality-related offense in Article 495 of draft Criminal Code is amended to Article 454 of draft Criminal Code of May 2018 with the following formulation:

1. Whoever commits obscene act with another of the same sex:
 - a. in public is punishable by a maximum imprisonment of 1 year and 6 months or must be fined as mentioned in category II.
 - b. With violence or a threat is punishable by a maximum imprisonment of 9 years or must be fined as mentioned in Category III.
 - c. And is broadcast as pornography is punishable by a maximum imprisonment of 9

⁷ During session among legislative members of the House of Representatives, *Kebangkitan Bangsa Party (PKB)* and *Keadilan Sejahtera Party (PKS)*, they were questioning why this formulation did not regulate sentences given to adults involved in adultery/buggery (done without violence). This formulation seemed to still legalise any indecent acts committed among adults of the same sex. PKB called for a change in which sentences also had to be given to adult homosexuals.

years or must be fined as mentioned in Category III.

2. Whoever, predicted or known to be under 18 years of age, is involved in an obscene act with another of the same sex is punishable by a maximum imprisonment of 12 years or must be fined as much as that mentioned in category IV.
3. Those involved in an act as mentioned in Paragraph (2) including violence and or a threat are punishable by a maximum imprisonment of 15 years or must be fined as mentioned in category V.

Significant different appears in Article 454 of draft Criminal Code where the scope is extended to regulate homosexuality:

1. Male adults involved in an obscene act that involves no violence/based on consensual sex in public.
2. Male adults who force others to commit obscene act with the same sex with force and violence or with a threat.
3. Male adults who commit obscene act and broadcast the act.

Another difference lies on the aggravation in case of the situation where obscene act is accompanied by violence.

Article 454 of draft Criminal Code was revoked in the session held on July 9, 2018.⁸The Chairman of People's Consultative Assembly of the Republic of Indonesia Mr. Zulkifli Hassan mentioned that the House of Representatives had four political parties that rejected LGBT. Amanat Nasional Party, via its Secretary General, has urged President Joko Widodo to release Government Regulation in Lieu of Law because Indonesia is seen as in emergency level concerning LGBT issues. A former member of Human Resource National Commission Manager Nasution also expresses Similar thought (Pratiwi, 2018).

Several regional regulations have banned the existence of LGBT in Indonesia:

1. Regional Regulation of the Province of South Sumatera Number 13 of 2002 on Indecency Eradication in the Province of South Sumatera;
2. Regional Regulation of Palembang Number 2 of 2004 on Prostitution Eradication;
3. Regional Regulation of the Regency of Banjar Number 10 of 2007 on Social Order;
4. Regional Regulation of Tasikmalaya Number 12 of 2009 on Development of Life values in Societies according to Islamic Values and Social Norms in Tasikmalaya;
5. Regional Regulation of Padang Panjang Number 9 of 2010 on Amendment of Regional Regulation of Padang Panjang Number 3 of 2004 on Prevention, Eradication, and Prosecution for Indecent Behaviours in Society;
6. *Qanun* Aceh Number 6 of 2014 on *Jinayat* Law.

Qanun Jinayat in Aceh

Sharia Islam in Aceh is supported by the provision of Article 125 of Act Number 11 of 2006:

1. Sharia Islam in Aceh consists of *aqidah*, *syar'iyah*, and *akhlak*.
2. Sharia Islam as intended in Paragraph (1) consists of worship, *ahwal al syakhsiyah* (law in a family) *muamalah* (civil law), *jinayat* (criminal law), *qadha'* (justice), *tarbiyah* (education), *dakwah* (preaching), *syiar*, and defending Islam.

⁸ <http://reformasikuhp.org/r-kuhp/>.

3. Further provisions over the implementation of sharia Islam as intended in Paragraph (1) are regulated in *Qanun Aceh*.

The establishment of *Qanun Aceh* Number 6 of 2014 on *Jinayat* law that applies in Aceh is an extension of Article 125 Paragraph (3) of Act Number 11 of 2006. Any regulations in *Qanun Jinayat* concerning LGBT are provided in Article 63 (*liwath*) as follows:

1. Whoever intentionally commits *Jarimah Liwath* is punishable by *Uqubat Ta'zir* where 100-time whip is applied or must be fined as much as 1000 g of pure gold or a maximum 100 month imprisonment.
2. Whoever repeats the act as mentioned in Paragraph (1) is punishable by *Uqubat Ta'zir* where 100-time whip is applied and it could be extended to twelve-month imprisonment.
3. Whoever commits *Liwath* to a child is punishable by *Uqubat Ta'zir* as mentioned in Paragraph (1) with 100-time whip or must be fined 1000 g of pure gold or a maximum 100-month imprisonment.

Article 64 (*musahaqah*) is stated as follows:

Article 64

1. Whoever intentionally commits *Jarimah Musahaqah* is punishable by *Uqubat Ta'zir* of maximum 100-time whip or must be fined maximum 1000 g of pure gold or maximum 100-month imprisonment.
2. Whoever repeats the act as mentioned in Paragraph (1) is punishable by *Uqubat Ta'zir* with 100-time whip and it could be extended to a maximum fine of 120 g of pure gold and/or a maximum twelve-month imprisonment.
3. Whoever commits *Jarimah Musahaqah* to a child is punishable by *Uqubat Ta'zir*⁹ as intended in Paragraph (1), extended to maximally a hundred-time whip or must be fined 1000 g of pure gold or a maximum 100-month imprisonment (Ibrahim, 2013, p. 1010).

Role and Influence of Islamic Law on National Law regarding LGBT issues

Pancasila has been regarded as the core ideology in Indonesia, where it positions godliness values on top of everything as the first principle followed by the other four principles: (2) Just and civilised humanity, (3) Unity of Indonesia (through diversity of its peoples), (4) Sovereignty of the People, (5) Social Justice. Those four following principles are relevant to the values of godliness. *Pancasila* as the core ideology of the state is in line with the preamble of the 1945 Constitution of the Republic of Indonesia as the constitution of the state. Its position as the core ideology of the state and the philosophy of the state means that all contents of the regulations written in Acts must not against values of *Pancasila* and the law of God.

Regarding the role of Islamic law from the perspective of national law, it is possible to mention that *Qanun Aceh* is based on sharia Islam. *Qanun Aceh* implements corporal punishment like whipping which is not recognised in Criminal Code as part of international law. It can be concluded, based on Regional Regulations mentioned earlier in this paper, that Islamic law plays an important role in the process of

⁹ Ta'zir is a punishment decided by a judge.

determining whether the act of LGBT is regarded as crime. Aceh is the only region that seriously implies the rule over and punishment for LGBT.

In a wider scope, in terms of national law, Islamic values have been introduced into regulations as desired by the people, as in line with Gustav Radbruch arguing that law will lose its meaning without the core idea of law per se (Warassih, 2005, p. 43). It can be seen from the homosexual issues that are still on their way to the draft Criminal Code.¹⁰

Conclusions

In Islamic law, homosexuality is a crime, and several regulations have regulated homosexuality with several sanctions imposed. However, only *Qanun Jinayat* that applies in Aceh in which punishment as regulated in sharia Islam is given. The tendency of national law in Indonesia is to ban LGBT. As long as the values embedded in the first principle of *Pancasila* serve as fundamentals of the establishment of regulations in Indonesia, there is no room for LGBT in Indonesia. When LGBT practices are banned, it is quite possible to regard LGBT as a crime according to national law since the draft Criminal Code has not been completely formulated. Islamic law serves as the guideline of values to determine whether a conduct is considered acceptable and decent and whether it is essential to regulate determine the issue as a crime. This is surely relevant to the first principle of *Pancasila*.

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Regional Regulation of Palembang Number 2 of 2004 concerning Eradication of Prostitution

¹⁰ Jeffrey S. Siker, in his book entitled *Homosexuality and Religion an Encyclopaedia*, mentioned "Islamic Condemnation of homoeroticism can effect criminal law in Muslim countries even where Shariah is not the law of the land, as in Malaysia where it is punishable by up to twenty years imprisonment, Mauritania where it is punishable by death, or Egypt where, classed among "offenses against public decency", it is punishable by up to five years imprisonment".

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