



Islamic Law's Role in Developing Policies Prohibiting Homosexuality as a Crime Against Morality in Indonesia

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Article

Abstract

Keywords:

Crimes; homosexuality; Islamic law.

Article History

Received: Dec 04, 2023;
Reviewed: Dec 09, 2023;
Accepted: Feb 20, 2024;
Published: Feb 29, 2024.

This research examines the significance of the Islamic law doctrine's role in the development of policies aiming to prohibit homosexuality as a crime against morality in Indonesia. The study focuses on the foundational contributions and core principles of Islamic law that form the basis for shaping policies concerning the issue of homosexuality. The research methodology involves an in-depth analysis of primary Islamic legal sources, along with an exploration of Indonesia's positive legal framework that influences the direction of these policies. Furthermore, the research encompasses legal case studies, an exploration of relevant literature, and an Islamic legal perspective regarding the efforts to prohibit homosexuality. Consequently, the research results deepen the understanding of the contributions and relevance of Islamic law in formulating policies that regulate homosexuality as a crime against morality in Indonesia. Moreover, this study aims to identify challenges and opportunities associated with the implementation of these policies.



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INTRODUCTION

The homosexual (gay) community has existed in Indonesia since 1982, which was marked by the establishment of the Lambda organization on March 1, 1982 (Khoir, 2020:5). The emergence of the organization made homosexual perpetrators no longer hide and shut themselves away from society. Now they appear confident by holding events that can prove that they are just like others and that their behaviour

does not deviate just because they like the same sex. Homosexuals in Indonesia are active in small communities. Activities held include discussions, open houses, research, and other small-scale social activities whose main purpose is to prove their existence and to recruit members (Safitri & Nasution, 2018). Coupled with all forms of international support, the existence of their community in this country is growing.

Addressing the issue of homosexuality is not new in this country. Many programs and activities are launched to support and accommodate movements for the benefit of members of the LGBT community, especially those fighting for rights and legalizing their community status. Unfortunately, now many young people commit and excuse homosexual deviation. For example, in a recent event Citayam Fashion Week, young people began to loudly declare the existence of LGBT in Indonesia (Laelani, 2022). This homosexual deviant behaviour appears as something strange in eastern cultured societies where people still uphold the teachings they profess, namely morality. Ethically and religiously, such acts of sexual deviance are unacceptable to society, and deviation of sexual orientation raises concerns for society because nowadays homosexuals are increasingly daring to introduce their group under the pretext of human rights (Abaver & Cishe, 2018).

However, the impact of homosexual relationships is very detrimental. Not only does it run afoul of religious norms (especially Islam) and change social order, but it also damages physical and psychological health (Syarifudin, 2022). Homosexual acts based on investigation can damage the soul and health, considering that sexual desire is a gift from Allah SWT as the completeness and perfection of human life. If it deviates from this *sunnatullah* it will have a negative influence on the body, mental health and morals (Umar, 2021). In terms of physical health, homosexuals have a high potential to spread HIV/AIDS and cancer in this country, as revealed by the child HIV task force regarding the high number of HIV cases due to same-sex intercourse among Indonesian adolescents. Not only among adolescents, the overall population of people with HIV among male and male enthusiasts (MSM) is also increasing. In 2021, with 36,902 cases detected, the prevalence among MSM jumped to 27 per cent, well below the heterosexual prevalence of 13.6 per cent. This increase was also expected to continue in 2022. In the first quarter of 2022, of the 10,525 HIV cases, 30.2 per cent occurred in homosexual actors, and another 12.8 per cent were in heterosexual activists (Lukihardianti & Kurnia, 2022).

Indonesia's positive law does not have specific rules related to the concept of criminal and criminal homosexual deviation. However, Article 1 of Law No. 1 of 1974 on Marriage implicitly prohibits same-sex marriage as explained in "Marriage is an inner birth bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the One and Only Godhead". The regulation confirms that the Indonesian state only recognizes the validity of marriage bonds between men and women (Disemadi et al., 2020), not

between same-sex persons. In addition, Article 2 paragraph (1) of the Marriage Law also states "Marriage is valid if it takes place according to the laws of each religion and belief, meaning that the state leaves it to their respective religions." Religious law in Islam expressly forbids same-sex marriage.

In addition to the above article, the punishment of homosexuals refers to Article 292 of the Criminal Code. The article contains the law related to lewd acts by adults on minors of the same sex, with a maximum prison sentence of five years. Meanwhile, same-sex relationships between two people who have grown up together cannot be punished under this Article even though the reality of lewd acts, namely deviant sex in several communities, is now increasing among teenagers, adults and even children. Article 292 of the Criminal Code cannot provide universal legal protection because the article only protects victims of homosexual crimes against minors and does not protect adults if they experience homosexual crimes. Of course, such an implementation of the article sparks injustice in society, particularly among adults when they experience homosexual crimes, leading to doubt in the community where the problem of homosexuality in Indonesia has not been fully considered intensively, especially in the absence of special rules regarding the punishment of perpetrators of these deviations (Tuhri, 2021).

Unlike Islamic law, the prohibition of homosexuality has been regulated since the time of the prophet Luth, the first-time homosexuals appeared. They were destroyed by Allah Almighty with the harsh torture of drowning in the earth and stone rain in retaliation for their dirty deeds. In addition, the punishment imposed is also quite severe, namely in the form of *ta'zir* to the death penalty to deter the perpetrators (MUI Fatwa on Lesbian, Gay, Sodomy, and Obscenity.). The issuance of the MUI fatwa is generally triggered by several reasons. Among them, MUI views that humans are God's creations. As a created being, of course, it has a basic human nature, which is to tend to sexual orientation. This sexual tendency is also born from human nature created in pairs. For this reason, MUI considers that this sexual tendency must be channeled based on methods justified by Islam through legal marriage.

In Indonesia, the implementation of Islamic law for homosexual cases has been applied in the Aceh region which is regulated by the Government of Nanggroe Aceh Darussalam Province. Aceh is allowed to apply Islamic law in the form of caning based on three laws, namely Law No. 44 of 1999 concerning the Implementation of Provincial Privileges of the Special Region of Aceh, Law No. 18 of 2001 concerning Special Autonomy for the Province of Aceh as Nanggroe Aceh Darussalam Province, and Law No. 2 of 2006 concerning the Government of Aceh. Meanwhile, sanctions for homosexual offenders are contained in Aceh Qanun No. 6 of 2014 concerning *Qanun Jinayah* Articles 63 and 64. The passing of the bylaw also still sparks several polemics and debates among legal experts where Qanun often clashes with positive

laws in force in Indonesia. The issue that often arises is which rules or laws more effectively punish perpetrators of crimes in this context.

METHOD

This research conducted an in-depth analysis of Islamic legal doctrine including the study of literature from primary sources, such as the Qur'an, hadith, and relevant regulations (Kayadibi, 2019). This approach aims to understand the principles and values of Islamic law that are relevant to the policies concerning homosexuality. Furthermore, this research involves a review of the positive legal framework in Indonesia that influences the formation of these policies, including an analysis of existing regulations (Al-Fatih, 2023). Legal case studies (Ansari & Negara, 2023) were also applied to understand the implementation of laws related to homosexuality in Indonesia. In addition, this study also applies to the prohibition of homosexuality from the perspective of Islamic law. With this diverse approach, this study seeks to deepen an understanding of the contribution and relevance of Islamic law in the formation of policies governing homosexuality as a criminal act of decency in Indonesia, while identifying challenges and opportunities associated with the implementation of these policies. The Juridical-Scientific-Religious approach involves merging the principles of criminal law with both scientific understanding and religious guidance, aiming to apply laws following both human knowledge and divine principles. It is a crucial foundation for implementing the law with a focus on both science and spiritual values (Widyawati, Latifiani, et al., 2022).

RESULTS AND DISCUSSION

The Contribution of Islamic Law to The Prohibition of Homosexuality in Indonesia

Homosexual comes from the word *homosex* which in Greek, namely *homo* means the same, and in this context, it is associated with same-sex attraction (Lyonga, 2021). This term was coined in 1896 by Karl Maria Kertbeny, a German-Hungarian physician. Homosexuality is a state of attraction towards people of the same sex (Ashton, 2019). This opinion is in line with the Indonesian Association of Mental Medicine Specialists (PDSKJI) medically defining homosexuality as a sexual disorder or tendency among those of the same sex, including lesbians and gays (Verdianto et al., 2023). Homosexual itself is part of LGBT (lesbian, gay, bisexual, and transgender) (Wiryani et al., 2021). Homosexuality is divided into two, gay (relationships between men) and lesbian (relationships between women). The use of the term LGBT is a strategy to unite groups of perpetrators of sexual deviance (lesbian, gay, bisexual, and transgender) in one unit with the aim of attracting sympathy from the wider community as well as official recognition from the government in a country. This view exists because others see

LGBT as behaviour that does not harm others and because this behaviour is done of their own volition.

The origin of the emergence of homosexuals in Islamic history began with the deviation of the sodomites of the time of the Prophet Luth (as). Among them were sexual intercourse between men (gay), as well as women (lesbians). In the Qur'an, the story related to Prophet Luth and his people is mentioned in many surahs, including al-a'raf, hud, al-hijr, al-anbiya, al-hajj, shu'ara, an-naml, al-ankabut, ash-shaffat, shad, qaf, adz-dzariyat, an-najm, al-qamar, and at-tahrim. When added up, the discussion is no less than 89 verses. Regarding the deviations of Prophet Luth, the most prominent is sexual perversion. Three surahs discuss such deviations, namely: al-a'raf [7]: 80, ash-shu'ara [26]: 165, and an-naml [27]: 54-55. Implying that people practised sexual perversion that had never been committed by any people far earlier. In a country known as Sodom or *Gomorrhah*, they were accustomed to same-sex relations. Today it is known as homosexual. The story of Prophet Luth in the Qur'an can serve as a basis for prohibiting homosexuality because this act is an abnormal sexual practice and sexual deviation that is very disgusting, so it is strongly condemned by Islam (Muslih et al., 2022). As viewed by Hamka in *tafsir* al-azhar, what the followers of Luth did was a bad and rotten temperament, where they lusted after young men instead of women. This kind of person's soul is something that is beyond normal limits (Juwita et al., 2022). One of the hadiths, the Holy Prophet, mentioned, "When there have been many incidents of men coming to men (having intercourse), Allah will remove His hands from creatures, so that Allah does not care in which valley they will perish." (HR at-Tirmidhi, al-Hakim, and At-Tabhrani). Homosexuality is also considered an endemic that religious people are worried about because it is very contrary to the teachings of the scriptures in Indonesia and damages human morals.

Currently, homosexuality is a phenomenon that occurs in regions and countries in the world. This phenomenon itself can develop based on the rules set in a country that allows and even legalizes homosexuality. The fact that the LGBT community continues to grow, both on a national and global scale, is undeniable. A global survey conducted in 2023 in 30 countries revealed that four per cent of respondents declared themselves unequivocally that they were homosexual, be they gay or lesbian. Four per cent identify as bisexual, one per cent identify as pansexual or omnisexual, one per cent asexual, and one per cent identify as other gender (Statista Research Department, 2023). Although the legality of LGBT has never been recognized by the state, the fact is that the group has mushroomed and spread almost throughout Indonesia. There has even been an increase in LGBT groups in Indonesia, especially gay people in urban areas such as Bali, Jakarta, Surabaya, and Yogyakarta. No exception is the westernmost region of the country (Aceh) known as the porch of Makkah Indonesia. So sooner or later the LGBT outbreak will spread evenly in Indonesia.

Homosexual perpetrators in Indonesia are increasingly courageous in showing their existence. The world of education was not spared from the actions of the perpetrators of sexual deviation. Padang State University (UNP) fired two lecturers who were indicated as lesbian, gay, bisexual, and transgender (LGBT). The case came to light in 2021 and the two perpetrators were fired in 2023 (Raharjo, 2023). Homosexual behaviour has also penetrated government agencies. In July 2023, a video was spread that recorded the action of members of Satpol PP Dharmasraya, West Sumatra making out with same-sex people and then went viral on social media. A woman made out with another woman while still in official uniform (Kampai, 2023). The development of technology and easy access to communication through social media make homosexual perpetrators increasingly grow. Even recently the Klaten Regency HIV/AIDS Mitigation Commission (KPA) has monitored six groups indicated to lead to sexual deviant activities of lesbian, gay, bisexual and transgender (LGBT). The group allegedly contains and discusses LGBT-related content (Syauqi, 2023). Moreover, homosexual behaviour has also penetrated the Banda Aceh region. In January 2021, a gay couple with the initials Mu (27) and Al (28) who were caught by Sharia police in Banda Aceh were caned 77 times each in Bustanussalatin Park, Banda Aceh City. Both were found to have violated Islamic law on suspicion of having committed *jarimah linath*. Both were charged with Article 63 paragraph (1) of Aceh Qanun No. 6 of 2014 concerning Jinayah Law.

The spread of homosexual perpetrators is like a time bomb waiting to explode if there is still no clear and detailed rule of law. It is necessary to understand that LGBT is a despicable act and is not legalized either legally or religiously (violating decency). Even the perpetrators will be subject to criminal acts of decency. Therefore, the community and government must reinforce the enforcement of LGBT law in Indonesia as a form of application to the values of Pancasila, namely the one and only God and humanity that is just and civilized. Law enforcement needs to keep up with changing values at local, national, and global levels to ensure that everyone, including the international community, accepts and agrees with how laws are enforced. This involves ensuring that the way laws are applied reflects the evolving values, and it requires law enforcement officials, including those involved in investigation, prosecution, courts (Mukhtar & Lailam, 2023), and community engagement, to simultaneously focus on building a legal culture through things like ethical practices and educational improvements to fully adapt to and serve as the users of law enforcement (Widyawati, Pujiyono, et al., 2022). Islamic Sharia is very protective of mankind from all possibilities, as in the content of *al-maqashid al-khamsah* or *al-kulliyat al-khoms*, namely the five core aspects. The five points consist of *hifdz ad-din* (maintaining religion), *hifdz an-nafs* (preserving the soul) with the punishment of *qishash*, *hifdz al-aql* (maintaining reason), *hifdz an-nasl* (maintaining offspring), and *hifdz al-mâl* (maintaining property or property) (Al-Fatih et al., 2023).

Seeing the purpose of *al-maqashid al-khamsah*, the rules of Allah exist to organize human life. The rules can be realized in real life if there is an awareness of Muslims to obey every commandment and stay away from all its prohibitions. Regarding homosexual behaviour, in Islamic law, it has been made clear that Allah has long forbidden it because there is no benefit for humans. Allah SWT said in Q.S. Al-Ankabut [29]: 28-29:

وَلَوْ طَآ إِذْ قَالَ لِقَوْمِهِ إِنَّكُمْ لَأَتَّاتُونَ الْفَاحِشَةَ مَا سَبَقَكُمْ بِهَا مِنْ أَحَدٍ مِنَ الْعَالَمِينَ (28) أَنْتُمْ لَأَتَّاتُونَ الرِّجَالَ وَتَقْطَعُونَ السَّبِيلَ وَتَأْتُونَ فِي نَادِيَكُمُ الْمُنْكَرَ فَمَا كَانَ جَوَابَ قَوْمِهِ إِلَّا أَنْ قَالُوا اتَّبِعْنَا بِعَذَابِ اللَّهِ إِنْ كُنْتَ مِنَ الصَّادِقِينَ (29)

“And (remember) when Luth said to his people, ‘Verily you have done a very heinous deed which none of the people before you have done’. Are you really supposed to go to men, daydreaming and doing evil in your meeting places? So, the answer of his people was none other than saying: “Bring to us the doom of Allah, if you are among the righteous” (QS. Al-Ankabut: 28-29).

This is also emphasized in the hadith that denounces homosexual offenders. In a shahih hadith, the Prophet *sallallahu ‘alaihiwasallam* said, “Allah has condemned those who commit the deeds of the followers of Luth (homosexuals), Allah has condemned those who commit the deeds of the followers of Luth (homosexuals), Allah has condemned those who commit the deeds of the followers of Luth (homosexuals).” (Narrated Ahmad and Abu Ya’la). No hadith contains a threat with such a strong anathema that the Prophet repeated it three times (Dwiyaniti, 2021). In the case of adultery, he only mentioned anathema once, as well as anathema directed against several perpetrators of major sins not more than once. This, coupled with the attitude of the friends who agreed to give death threats to homosexuals where none of them took a different stance. They differ only in terms of how the execution is carried out.

Based on the Qur’an and hadith, fiqh scholars agree to ban homosexuality based on the rules of *fiqhiyah* which says: “Sex is basically *haram*, so a proposition (clear and sure reasons without doubt) justifies it, namely the existence of a marriage contract” (Yanggo, 2018). Similarly, the prohibition of lesbian acts, based on the hadith of the Holy Prophet (peace be upon him) narrated by Muslims from Abi Said. “Let not men look at the *aurat* of other men and let not women look at the *aurat* of other women and do not touch men with other men under a blanket or cloth, nor should women come into contact with other women under a blanket or cloth”.

This explanation indicates that homosexual and lesbian acts are *haram*, whether it is for married couples. Any expression or statement stating that homosexuality and lesbians are permissible is not sourced from the teachings of the Qur’an or hadith nor is it the result of *ijtihad* ulama who are qualified in their fields. Only liberals who are armed with a little religious knowledge and have not studied well the verses of the

Qur'an and hadith would give misleading fatwas legalizing homosexual and lesbian behaviour (Yanggo, 2018).

The discussion of homosexuality always leads to punishment for the perpetrators because according to jurists, the arguments in favour of banning homosexuality come from the Qur'an and the history of Prophet Luth. Therefore, the scholars of the madhhab, except the Imam Hanafi, prescribed the death penalty by stoning homosexuals (Khairani, 2019). Although Hanafi considers it a sin that is not specifically specified in the Qur'an, it remains punishable by *ta'zir* (deterrence) because it is not part of the sin of adultery. According to Sayyid Sabiq, fornication or homosexuality is prohibited by sharia law and is a crime more heinous than adultery (Zaharin, 2022). *Liwaṭh* is an act that is contrary to human decency and nature and is dangerous to the person who does it. Fiqh scholars have differing views on the punishment of homosexuality (Arli et al., 2020), including 1. Killed absolutely. 2. Dihad is like the limit of adultery. If the perpetrator is traced, he is tortured, and sentenced to stoning if he is married. 3. Subject to *ta'zir* law (Sabiq, 2006).

Al-Imam ash-Shaukani (may Allah have mercy on him) in "*ad-darariy al-mudhiyal*" explained that for perpetrators of homosexual deviation, the death penalty (*balal* to kill) is given, both the perpetrator (*fa'il*) and the object (*maf'ul bih*) if both have reached puberty. As for the existence of a person who commits *liwaṭh* with his penis), he is punishable by the death penalty. Even though the person who does it is not married, it is the same as whether he is *fa'il* (perpetrator) or *maf'ul bih*. The Holy Prophet ordered his people to kill and prosecute homosexuals. The command is as stated in the hadith narrated by nasai and ibn majah from ibn Abbas: "Whoever you find doing such acts as the Luth (homosexual acts), then kill the culprit and his spouse because of it." (HR. Ibn Majah from Ibn Abbas, vol. II, 856, hadith no. 2561)

However, the opinion of Imam Shafi'i wants homosexual perpetrators to be stoned to death for sodomy, both virgins and girls because he sees sodomy or *liwaṭh* as a very cursed act and considered a *jarimah* (criminal act). In Shafi'i's perspective regardless of the perpetrator, whether committed by an unmarried person or a married person, it was referred to as Fahisyah and was considered against the law, nor does it diminish its criminal value although it is done voluntarily or consensually. Although no one feels aggrieved, sodomy is seen as a very despicable violation of sexuality without knowing priorities (Syaltut, 2000).

The *ta'zir* punishment also applies to lesbian offenders. Al-Imam Malik (may Allah have mercy on him) argued that "the woman who commits *sibhaq* is imposed with whipping a hundred times". *Jumhur* ulama argues that "a woman who performs *sibhaq* has no *hadd* for her only that she is *ta'zir* because she only has a relationship that cannot be with *dukbul* (*menjima'i to farji*), she will not be *hadd* like a man who has intercourse with a woman without *dukbul* to *farji*, so there is no *hadd* for her" (HR. Abu Daud no. 3869).

As for a man in Islamic law, it is forbidden to equate himself with a woman and vice versa, especially if he changes his sexual organ. This prohibition contains major sins involving many other parties, where the process of sex reassignment will of course involve a doctor who operates it, people who provide moral support (Sunaryo, 2021) in the operation effort, and many others. All of them share the same sin, as in *qaidah fiqhiyah*—*maa burima akhdzuhu burima ithaa'wuhu*, meaning “whatever is forbidden to receive it, it is forbidden to give it. When transvestites successfully transform their sex to have sex with men, they have another great sin because it is classified as a homosexual act.

The MUI fatwa No. 57 of 2014 concerning lesbian, gay, sodomy, and fornication expressly decrees that the perpetrators of sodomy (*liwat*) both lesbian and gay are *haram* and a form of crime. This act can be subject to *ta'zir* which can be in the form of caning, up to the maximum *jarimah* which is up to the death penalty. Likewise, in the case of homosexual crimes (*jarimah*), in sodomy with underage victims, the perpetrators can also be subject to aggravation up to the death penalty (MUI fatwa on lesbian, gay, sodomy, and fornication).

In addition to preventive and repressive measures, some measures for rehabilitation are also considered in Islamic law to ensure that every Muslim can obey all Islamic laws based on faith. Therefore, in Islamic history, the 13 years of the Prophet in Mecca focused on building the creed and faith of Muslims so that they became devout Muslims. In addition to the formation of creed and faith in Islam, repentance is also taught for Muslims who have already committed crimes. According to Ibn Taymiyah, some *hudud* sentences can be aborted if the perpetrator has repented before being presented before a judge (Sabiq, 1998). Several verses state that repentance can abolish the punishment of the limit, among others in Q.S. Al-Baqarah verse 160 and Q.S. Al-Maidah verse 39.

إِلَّا الَّذِينَ تَابُوا وَأَصْلَحُوا وَبَيَّنُّوا فَأُولَٰئِكَ أَتُوبُ عَلَيْهِمْ وَأَنَا التَّوَّابُ الرَّحِيمُ

"Except those who have repented, made improvements, and explained (him). They are the ones I have repented of. I am the one who is the recipient of repentance and the most merciful." (Q.S. Al-Baqarah verse 160)

فَمَنْ تَابَ مِنْ بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ ۗ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ

"Therefore, whoever repents after committing tyranny and improving himself, Allah accepts his repentance. Verily, God is merciful." (Q.S. Al-Maidah verse 39)

From the verses mentioned above, some types of punishment will be ineffective when the perpetrator of the *jarimah* has repented. Among the *hudud jarimahs* whose

punishment is aborted according to the above verse include adultery, *hirabah* and theft. However, this opinion was opposed by Imam Abu Haneefah, Imam Malik, and Imam Shafi'i arguing that repentance did not hinder the execution of the punishment of *hadd* because, in some examples of the Messenger of Allah, he still cut off the hands of Maiz and Ghamidiyah who had stolen and surrendered themselves to the Messenger and repented. Likewise, the apostle cut off the hand of Amar ibn Samurah for confessing to stealing (Sabiq, 1998).

The formation of *faith* and *aqidah* as well as the provision of opportunities to repent properly is one form of rehabilitative effort for *jarimah* practitioners. As for people who have never committed a crime but may have the potential to commit crimes, every Muslim is commanded to advise each other for truth and patience, but when it comes to punishment, our association always turns to the set of legal provisions that have sanctions and the purpose for which they are sanctioned. In Islamic law, the types of sanctions for perpetrators of *jarimah hudud* have been mentioned, as is the case of *jarimah qisas-diyat*. While the *jarimah ta'zir* is left to the ruler to determine the type, shape and size of the sanction, with the estimated punishment of *ta'zir*, it has preventive, repressive and rehabilitative potential.

The rules of Islamic Sharia are also contained in the *Qanun Jinayah Aceh*. In Acehnese society, the mention of qanun as a rule of law or *adat* has been used for a long time and has become part of the customs and culture of the Acehnese people. Many legal and customary rules of the Kingdom of Aceh are called qanun. Qanun usually contains Islamic sharia rules that are adapted to the customs of the Acehnese people. The provisions regarding qanun are contained in Law No. 11/2006 concerning the Government of Aceh, namely:

1. Qanun Aceh is a kind of provincial regulation that regulates the administration and life of the people of Aceh.
2. State/city Qanun is a law like the state/city regional regulations that regulate the administration and life of administrative/city communities in Aceh.

From the provisions of the two articles above, the purpose of qanun can be equated with regional regulations of other provinces in Indonesia, but in principle, it is not appropriate to equate qanun with regional regulations. Qanun is a valid law in Aceh, whose content must be based on special Islamic sharia Aceh, in contrast to other regions whose regional regulations must not be based on Islamic teachings. In addition to being different from other regional regulations in Indonesia, the provisions in the qanun may contain substantive legal provisions and formal procedural laws of sharia courts (Rosidah et al., 2023).

Therefore, the meaning of qanun is not the same as local regulations because the content of qanun must be based on Islamic principles or must not contradict Islamic law. However, according to the Indonesian legal hierarchy, Law No. 12 of 2011 concerning the Design of Laws and Regulations, the status of qanun is equated with

other regional regulations. According to Law No. 12 of 2011, the types and hierarchy of legal provisions are as follows: (Article 7(1) of Law No. 12 of 2011) The explanation of Article 7 states that the types of provincial regional regulations include *qanun* applicable in Nanggroe Aceh Darussalam Province, as well as Special Regional Regulations (henceforth referred to as *Perdasus*) and Regional Regulations (henceforth referred to as *Perdasi*) applicable in Papua Province.

Based on the provisions above, the position of *qanun* in the hierarchy of Indonesian laws and regulations is recognized and equated with regional regulations. For example, based on the details provided by the central parliament to the Aceh, the *qanun* governing *jinaya* or Islamic criminal law as procedural law can be passed in sharia courts. This *qanun* product can only meet the conditions that must be met by the Aceh government, and these conditions involve compliance with *aqidah*, *syar'iyah*, and morals. That is, regarding the status of *qanun*, the definition of *qanun* can be said to be "similar" (Kamus Besar Bahasa Indonesia defines it as "similar to regional regulations" but different in content because *qanun* has characteristics that other regions in Indonesia do not have. The position of the *qanun* is specified in the following statute:

1. Law No. 18/2001 concerning Special Autonomy of Aceh Province to Nanggroe Aceh Darussalam Province; the position of the *qanun* is specified in Article 1 paragraph 8 which states that "the *qanun* of Aceh province is a territorial law that regulates the application of laws and regulations in the territory of Aceh province in relation to the exercise of special autonomy."
2. Law No. 11/2006 concerning the Government of Aceh; Articles 21 and 22 state that "*qanun* is one type of local regulation that regulates the administration and life of the Acehnese people."
3. Law No. 12/2011 on draft laws and regulations; this law states "provincial regional regulations include *qanun* applicable in Aceh province and special regional regulations (*perdasus*) and provincial regional regulations (*perdasi*) applicable in Papua Province and West Papua Province."

Acehnese people who are accused of committing sexual intercourse with the same sex will be processed and punished in accordance with Aceh *Qanun* No. 6 of 2014 concerning *Jinayah* Law as the applicable law. In the Acehnese *Qanun Jinayah*, homosexuals are divided into two, namely *liwath* and *musabaqah*. The definition of *liwath* is formulated in Chapter 1 No. 28, defining that *liwath* is the act done by a man by inserting his penis into the rectum of another man as consensual intercourse." The definition of *musabaqah* is contained in Article 1 No. 29, defined as "the act of two or more women by rubbing each other's limbs or vagina to obtain sexual stimulation (pleasure) as a consensual intercourse."

The punishment or *jarimah* for perpetrators of *liwath* crimes is contained in the tenth part of Article 63, while *musabaqah* is in the eleventh part of Article 64. Where Article 63 states: "(1) any person who knowingly commits *jarimah liwath* shall be

threatened with '*uqubat ta'zir*' at most 100 (one hundred) lashes or a fine of not more than 1,000 (one thousand) grams of pure gold or imprisonment for not more than 100 (one hundred) months. (2) Any person who repeats *jarimah liwath* shall be threatened with '*uqubat ta'zir*' flogging 100 (one hundred) times and may be increased by a fine of not more than 120 (one hundred twenty) grams of pure gold and/or imprisonment for a maximum of 12 (twelve) months. (3) Any person who commits *liwath* with a child, other than being threatened with '*uqubat ta'zir*' at most 100 (one hundred) lashes or a fine of not more than 1,000 (one thousand) grams of pure gold or imprisonment for not more than 100 (one hundred) months, may be supplemented by flogging for not more than 100 (one hundred) times or a fine of not more than 1,000 (one thousand) grams of pure gold or imprisonment for not more than 100 (one hundred) months." In terms of the punishment or *jarimah* in the criminal act of *musabaqah*, Article 64 has the same legal content as Article 63.

For *jarimah liwath* whose victims are children (verse 2), in addition to threatening the perpetrator with '*uqubat ta'zir*' paragraph (1), the *qanun* of *jinayah* law authorizes the judge to add '*uqubat*' which is "flogging at most 100 (one hundred) times or a fine of not more than 1,000 (one thousand) grams of pure gold or imprisonment for not more than 100 months". Thus, the '*uqubat*' sanctions contained in the Aceh *Qanun Jinayah* No. 6 of 2014 of Articles 63 and 64 mentioned above, sanctions are imposed in the form of *ta'zir* punishment because they are the decrees of the government and scholars. The characteristic of *ta'zir* punishment in the *Qanun Jinayah* is found in the jurisdiction that Allah Almighty deliberately gave freedom to humans to determine for themselves in terms of what actions need to be categorised as prohibited acts and what punishments should be imposed by the perpetrators of prohibited acts with the aim of upholding *Amar Ma'ruf Nahi Mungkar*. *Ta'zir* punishment is within the authority of the government/ruler to govern society.

Currently, in the realm of criminal law legislation, the above article has been updated in article 414 of Law No. 1 of 2023 concerning the Criminal Code which also specifies the prohibition of homosexuality as an immoral crime. The article developed the content of Law No. 1 of 1945 concerning Articles 281 and 292 of the Criminal Code (related to immorality and same-sex molestation of minors). Article 414 of Law No. 1 of 2023 concerning the Criminal Code now further expands the understanding, as well as the criteria for same-sex abuse committed knowingly (intentionally) before the law, which is included in the criminal category of decency, with a penalty of imprisonment. The new provision in Article 414 of Law No. 1 of 2023 against same-sex fornication brings fresh air for legal certainty against this act. In this case, the difference between the new criminal code (law no. 1 of 2023) and the old Criminal Code (law no. 1 of 1946) lies in the victim, not only explaining the opposite sex but also the same sex, especially regardless of whether the victim is a child or an adult. However, only paying attention to the provisions stipulated in the criminal code will

cause problems and the actions charged to the perpetrators will need to be further interpreted (Henry et al., 2018).

Article 414 of Law No. 1 of 2023 which reads: "(1) any person who commits lewd acts against another person of different or the same sex a. in public will be sentenced to a maximum imprisonment of 1 (one) year 6 (six) months or a maximum fine of category iii; b. by force or threat of violence is punishable by a maximum imprisonment of 9 (nine) years; c. published as pornographic content is punishable by a maximum imprisonment of 9 (nine) years; (2) Any person by force or threat of violence compels another person to commit lewd acts against him, shall be punished with imprisonment for not more than 9 (nine) years."

The content of the article above explains that same-sex sexual acts will violate article 414 of Law No. 1 of 2023 if someone commits same-sex sexual acts in public, by force or threat, and publishes the acts on social media will be imposed with criminal sanctions in the form of imprisonment or fines determined by the Article. Publishing pornographic photos or videos on social media by the perpetrator also violates Article 27 of the IET Law No. 11 of 2008. If the term sodomy is mentioned in Article 414 of the Criminal Code, the perpetrator can be charged under Article 414. In this case, sodomy can be classified as obscene. As explained above, immoral acts are any actions that are contrary to decency included in the realm of sexual desire (Sudirman et al., 2023).

Article 411 paragraph (1) has the potential to ensnare homosexual offenders. However, the criminal threat can only be applied if there is a party who complains or because this article is a complaint offence. The threat of imprisonment is a maximum of one year or a maximum fine of category ii. The obscene acts punishable under the new Criminal Code are those involving coercion regardless of whether they take place between same-sex or different-sex people. However, consensual homosexual acts should also be questioned. The absence of strict prohibition in the Criminal Code regarding immoral acts such as homosexuality violating moral norms remains an issue in the Criminal Code.

Criminal and Penal Formulation Policy Prohibition and Punishment of Homosexuality in Indonesia as an Effort to Reform the National Law

Understanding the absence of detailed regulations related to homosexual abuse in Indonesia, juxtaposed with the latest news facts related to the increase in HIV cases, is inextricable from the rise of homosexual relations as a Western cultural trend that begins to be normalized by several groups in Indonesia, which is very detrimental to society, in terms of social and health aspects, while it violates religious norms contained also in the basis of state philosophy (Abustan, 2022a), namely Pancasila (Abustan, 2022b), especially the first precept (Yuliastini et al., 2018)(Arie Notoprodjo et al., 2022).

Therefore, to break the chain of sexual abuse, to reduce the increase in HIV in Indonesia, a breakthrough is needed to formulate, regulate, punish, and solve all problems related to homosexual abuse. This can start from defining in detail what a homosexual crime is, which is included in the realm of moral violations (Sarnoto & Nurdin, 2022), explaining the legal subjects that can be liable, whether it is categorized as adult or underage perpetrators or victims, to setting forth articles that contain punitive sanctions for violators. As formulated in Article 414 of Law No. 1 of 2023 concerning the Criminal Code, it is appropriate to include homosexual relations in the criminal offence of decency. In this case, the offence involves a conscious same-sex immoral (obscene) relationship in public, and the perpetrator can be subject to criminal penalties (Widyawati, 2019). Furthermore, there is no legal safeguard enabling survivors of sexual violence to regularly access AIDS screenings. If this knowledge comes too late, addressing it will also be delayed. The proposed legislation aimed at eradicating sexual violence will resolve this issue by establishing guidelines that make it easier for victims to receive regular health screenings (Widyawati et al., 2021).

Regarding the legal content, the ideal model of punishment for homosexual cases in Indonesia in imposing criminal sentences should reflect on the application of the qanun Aceh in overcoming *liwath* and *musabaqah* cases (Zainuddin & Sahban, 2018) and the application of sharia law (caning law as a deterrent effect) (Suganda et al., 2021), as well as the prevention system through patrols from the PP-Wilayatul Hisbah police force which responds quickly to citizen reports on homosexual cases. However, the researchers' input in imposing punitive sanctions is not only focused on absolute theories (revenge), either caning or imprisonment, but it also encompasses rehabilitation and education services. This is done to organize the future of convicts (post-conviction) to avoid stigma in society and to ensure that other communities do not try to commit homosexual crimes.

First, the imposition of criminal punishment should ideally pay attention to the origin of the perpetrator's actions, the perpetrator's attitude during the trial process, and the penal mediation process or other ways of problem-solving that have previously been carried out (Hariyanto & Sugama, 2021). It is used to see the level of ability to hold responsibility and the scope or association of perpetrators during the commission of homosexual crimes. This condition will be considered by the judge to decide the fulfilment of all elements of punishment. One of the recommendations that is considered quite effective in reducing the number of homosexuals is the application of Islamic law, namely the application carried out by the Aceh Sharia Court, where the perpetrators will be sentenced to caning performed in public (Zada et al., 2022). This punishment is given as a social sanction in the form of shame and as a lesson for wider communities.

Secondly, rehabilitation and education are provided to restore the perpetrator's psychology, enabling their genuine recovery and eventual acceptance back into the

community. Homosexuality itself is seen as a behaviour that holds a degree of addictive tendencies like drug use. Therefore, rehabilitation and education aim to instil new, positive habits in offenders. This circumstance is intertwined with the perpetrator's approach to all forms of social interaction, emphasizing an increase in faith and piety. In legal politics, the focus is on the selection and methods employed to attain specific social and legal objectives within society. Political law represents the state's policies enacted through authorized state agencies, intending to establish desired regulations reflecting societal values and aspirations (*ius constituendum*). The endeavour is to create reasonable regulations based on prevailing circumstances. It involves the enactment and renewal of legislation, incorporating legislators' core principles and adapting legal materials to meet the evolving needs of law creation (*ius constituendum*). Implementing existing statutory provisions reinforces institutional functions and shapes law enforcement personnel (Widyawati, 2020).

The purpose of criminal punishment, rehabilitation, and education is a form of protection for the community. This is done to achieve welfare in accordance with the political concept of criminal law (Aldino & Krisna, 2023). Protection of the community is carried out by revoking some of the ownership of criminal offenders in accordance with the provisions of Article 113, Article 116, and Article 120 of Law No. 1 of 2023 concerning the Criminal Code. Sanctions involve the revocation of driver's licenses, deprivation of profits gained from criminal acts, corrections due to criminal acts, job training, rehabilitation, to supervision by certain institutions. The success of the punishment model is reflected by the positive attitudes and actions of post-conviction behaviour while the failure of the punishment model is marked by repeated criminal offences. This is related to the attitude of repentance and behaviour of convicts who have not fully received the meaning of suffering during their time in prison. The potential failure after the convict returns to society should not be the reason for judges not to apply the sanctions (Rosyadi & Fatoni, 2023).

CONCLUSION

The discussion surrounding how Islamic law contributes to the prohibition of homosexuality in Indonesia, coupled with the development of criminal policies addressing homosexuality in the pursuit of reforming national law, underscores the fusion of religious, cultural, and legal principles within the Indonesian context. The focal point of outlawing homosexuality in the country's legal framework, predominantly influenced by Islamic jurisprudence, signifies the considerable impact of religion in moulding societal norms and legal statutes. This mirrors the intricate interplay among personal liberties, entrenched customs, and the call for legal transformation in Indonesia. The legislative measures prohibiting homosexuality represent legal reactions to delicate societal concerns while striving to uphold standards deemed acceptable by the majority. However, this has sparked extensive debate, with

some viewing such legal enforcement as conflicting with human rights, individual liberties, and the ethos of inclusivity and societal equity. Consequently, endeavours aimed at reforming Indonesia's national laws should strive to strike a harmonious balance between religious precepts, individual freedoms, and safeguarding human rights to establish a legal framework that fosters greater inclusivity, equity, and justice for all citizens of Indonesia. In consequence, the authors agree on the societal norm that prohibiting homosexuality in Indonesia is aligned with cultural and religious values. This reinforcement in the manuscript solidifies the prevailing belief, reflecting and perpetuating the societal stance against same-sex relationships, thereby maintaining the existing status quo.

ACKNOWLEDGEMENTS

The authors express their gratitude to Universitas Negeri Semarang for their generous support and financial assistance.

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