



LGBT PROBLEMATICS IN LEGAL PERSPECTIVES AND HUMAN RIGHTS IN INDONESIA WITH QAWAID AL FIQHIYAH APPROACHES

Atikah Rahmi

Faculty of Law, Muhammadiyah University of North Sumatra
Medan, Indonesia

Email: atikahrahmi@umsu.ac.id

Abstract

The discourse on LGBT's behavior warmed up in Indonesia after the Constitutional Court Decision which rejected the parties' request for judicial review of the expansion of the meaning of adultery in Articles 284, 285 and 292 of the Criminal Code. Groups that are pro-LGBT think that the Constitutional Court Decision is their legality, even though there is no connection between the rejection of the parties' requests and recognition of LGBT groups. LGBT raises a polemic in the community, so there are pros and cons to its existence. Groups that are pro-LGBT campaign for human rights principles that are anti-discrimination, while counter-groups precisely consider LGBT to endanger generations and therefore a clear legal policy is needed as an effort to overcome sexual deviations committed by LGBT, considering their behavior is contrary to legal, religious and public order in Indonesia. Based on the wisdom of ushuliyah, the LGBT because of medical (biological/genetic) factors, is relevant to the human rights perspective, that they must be protected, embraced and treated without discrimination. Whereas for LGBT activities and movements that commit sexual deviations, the qawaid al fiqhiyah approach must be prevented and prohibited and even deserve the heaviest punishment, namely the death penalty.

Keywords: LGBT, Human Rights



A. Introduction

Indonesia, which is a legal state based on the values of the Pancasila as the foundation of the State and the foundation of the philosophy of life in the nation and state, highly upholds the principles of human rights (read later: HR).¹

MaHFud MD in Muladi stated that human rights are inherent rights to human dignity as God's creatures, and these rights are carried by humans from birth on earth so that these rights are natural (natural), not gifts from humans or the state. So, human rights are rights that are given directly by *Allah SWT* and therefore there is no power in the world that can revoke them.² But that does not mean that with the name of human rights one can act as he pleases. If someone does something that actually causes harm or violates the human rights of others, then he must be accountable for the actions he has committed.³

Indonesia is a democratic state that upholds the values of human rights, respects freedom of expression as one of its fundamental rights, as stipulated in Article 28 E paragraph (2) and (3) of the 1945 Constitution of the Republic of Indonesia (read later: Constitution RI 1945).⁴ Article 22 paragraph (3) of the Republic of Indonesia Law No. 39 of 1999 concerning Human Rights states, "Every person is free to have, issue and disseminate opinions according to his conscience verbally or in writing through printed media and electronic print media by observing religious values, morality, order, public interest and national integrity".

In connection with this, the discourse on the status of Lesbian, Gay, Bisexual, Trans gender (henceforth read: LGBT) has disturbed and disturbed the peace in society. LGBT issues become a spectacular phenomenon in Indonesia. Various anti-LGBT posters were seen on the road, filled with hatred towards LGBT which enlivened social media, discussions and studies on LGBT both pro and contra were carried out in various scientific forums. The topic of his discussion was verbal abuse,



physical violence and abusive treatment of LGBT groups and MUI's illicit fatwa on lesbian and gay.

The issue of LGBT is getting heated up in Indonesian society after the Constitutional Court (read on: CC) issued a decision rejecting the request for a judicial review of Article 284, 285 and 292 of the Criminal Code through Decision No. 46/PUU-XIV/2016. In the petition, the parties appealed to the Constitutional Court to clarify the formulation of decency offenses set out in the three articles in the Criminal Code. While the five judges jointly decided that the parties' requests included the formulation of offenses or new crimes and had been included in the "criminal policy" area which was the legislative authority, namely the DPR and the President, not the Constitutional Court, so that it was considered not the authority of the Constitutional Court. After the Court's decision, groups that were pro-LGBT felt protected, as if their behavior had become legal. In fact, the Court's decision did not correlate with LGBT legality in Indonesia at all.

Pro LGBT groups claim that it is their human right to choose LGBT. As human rights, they demand to be protected by their human rights as stated in the Preamble of the Universal Declaration of Human Rights (UDHR); Human rights need to be protected by legal regulations, so that people will not be forced to choose the path of rebellion as a last resort to oppose the zealotry and occupation.

Based on the 2015 CIA survey results, the number of LGBT populations in Indonesia is among the fifth largest in the world after China, India, Europe and America. Several independent domestic and foreign survey institutions also mentioned that Indonesia has 3% of LGBT residents, meaning that out of 250 million residents, 7.5 million are LGBT, or more simply 100 people gathered somewhere 3 of which are LGBT.⁵

LGBT groups are increasingly developing communities and demanding that same-sex marriages are human rights and in the name of "HR" also ask the public and the state to acknowledge their existence. LGBT behavior starts from a homosexual preference, then manifests itself



in homosexual acts, then finally sticks in the form of struggle to be accepted as normal behavior in forming a family institution.⁶

While the counter-parties feel that LGBT people are uncommon to grow in the midst of Indonesian society with a strong custom and religion, so that the comfort of the community to socialize freely can be disrupted. This raises concerns for the community, even resulting in mutual suspicion of the presence of LGBT people around them.

B. Research Methodology

The article entitled "**LGBT Problems in Various Law and Human Rights Perspectives in Indonesia with the *QawaidFiqhiyah* Approach**" was compiled with the aim of understanding the human rights perspective in Indonesia, including in Islamic law about LGBT behavior and comprehensive efforts in overcoming the rampant LGBT in Indonesia. This paper will examine the existence of LGBT whose sexual orientation is considered as a deviation, sin, *haram* and malice. This paper will further elaborate on LGBT in the perspective of Law, Human Rights (HR) and Islamic Law by using the *qawaidulfiqhiyah* approach. The research is normative juridical research with a type of qualitative research, using data sources from the Qur'an, and secondary data consisting of primary legal material in the form of legislation, secondary legal material in the form of literature from books, court decisions and journals and media.

C. Results And Discussion

A. Overview of LGBT

The existence of LGBT which stands for Lesbian, Gay, Bisexual and Transgender⁷ in the world has been around for a long time, starting in the 19th century. In the 19th century, American Psychiatric Association (APA) still considered homosexuality a mental disorder. The history of the development of people's views on LGBT originated from a *Socarides* perspective which stated that LGBT is a mental illness.⁸



The existence of LGBT, transvestites, *bissu*, *wadam* and other references has actually existed during the long journey of human history. Talks about LGBT re-emerged after the actors increasingly showed their existence, causing unrest in the community.⁹ Ironically, information and news about LGBT, heartbreak and feelings, especially a sense of diversity and humanity. So, it is as if LGBT groups are no longer considered part of humans.

The LGBT phenomenon that is rife in Indonesia is related to the trend of liberal countries that provide recognition and a place for LGBT communities in society. LGBT is considered a part of the modern life style of society which regards the view of heterosexuality as conservative and does not apply to everyone. Social legitimacy arises with a priori scientific and theological defense in order to strengthen claims about their existence and social goals. That situation then made the LGBT movement spread so rapidly as a social epidemic.¹⁰

Liberal support for LGBT is not only in the form of discourse, but also realized by establishing unity organizations, seminar forums and the establishment of international fund foundations. Even some countries have legalized and facilitated similar marriages. One of the fundraising institutions supporting LGBT human rights protection is an institution inaugurated by US Secretary of State Hillary Rodham Clinton. The institution aims as an effort to realize justice, advocacy, protection and dialogue to guarantee LGBT freedom without discrimination.¹¹

LGBT behavior raises a variety of deviant assumptions about sexuality, because it clashes between his desires with the basic principles of life, resulting in disruption of social functioning. In fact, there is no religion, human value, or value of benefit that justifies this behavior. The lives of LGBT people are very vulnerable to various health problems, especially HIV and AIDS. Based on data from WHO shows that almost 90% of HIV sufferers are homosexuals and 60% of AIDS sufferers also come from homosexuals. This fact is certainly very ironic and also



dilemmatic, because in fact many countries provide concessions to such associations.

Meanwhile, RustamDaharKarnadi Apollo classifies LGBT phenomena in two different entities, namely: the first LGBT entity, that LGBT is a mental illness, or a sexual deviation inherent in a person is caused by biological and sociological factors. While the second entity is LGBT as a community or group or organization that has certain vision, mission and activities.¹² At the second entity level this is discussed in the community, even now they often hold gay parties and other activities that cause unrest in Indonesian society.

B. LGBT in the Perspective of Human Rights and Law in Indonesia

Human rights are basic rights given by God and are naturally owned as human nature and therefore must be protected, respected and should not be ignored. This right is then protected in the form of legal regulations. Based on its definition, it can be seen how human rights position with the law made by the state.

Human rights are basic rights that are inherent in human beings throughout their lives as God's gifts, are universal and must be protected legally or human rights formalized in the existing set of legal rules. Based on this position, the law is a condition of sine qua non in upholding human rights, the complete legal instrument on human rights is one of the sources of human rights law that awaits the political steps of world leaders and state leaders to enforce it. The contents of human rights can only be traced through the search for legal and moral rules that apply in society.¹³

Human rights are rights that are given directly by *Allah SWT* and therefore there is no power in the world that can revoke them. However, it does not mean that with their rights someone can act as he pleases. If someone does something that actually causes harm or violates the human



rights of others, then he must be accountable for the actions he has committed.¹⁴

There are two (2) perspectives on human rights, namely Universal Human Rights and Particular Human Rights.¹⁵ Based on the Declaration of Human Rights in Cairo that western human rights and eastern human rights are different. Human rights must be adapted to religion and customs (particular). The Cairo Declaration was then adapted by the State of Indonesia. Based on the Declaration of Human Rights in Cairo, according to the Indonesian constitution HAM has limitations, namely; may not conflict with morals, religious values, security and public order (in accordance with the Cairo Declaration ratified by Indonesia in 1998).

Indonesia is not a religion-based country but Pancasila clearly states in its first principle "Belief in the One and Only God" so that religious values become guardians of the joint constitution in realizing the democratic life of the Indonesian people. What must be considered is that human rights in Indonesia must be in line with the philosophy of the Pancasila. The implementation of human rights must also pay attention to the lines that have been determined in the provisions of the Pancasila philosophy.

The implementation of human rights does not mean implementing as freely as possible, but must pay attention to the provisions contained in the view of the Indonesian nation, namely Pancasila. This is because basically there are no rights that can be carried out absolutely without regard to the rights of others. Every right owned by someone will be limited by the rights of others. If in exercising rights, ignoring the rights of others, what happens is a conflict of rights or conflict of interest in the life of the community, nation and state. As a country that considers Pancasila, Indonesia recognizes and upholds human rights and basic human freedoms as rights that are inherently inherent and not separate from humans that must be protected, respected, and upheld for the sake of increasing human dignity, prosperity, happiness and justice.



The restrictions on human rights are regulated in Article 28 J paragraph (2) of the 1945 Constitution of the Republic of Indonesia, these provisions are also contained in Article 70 and 73 of the Human Rights Law No. 39 of 1999.¹⁶ Based on these provisions it can be concluded that the State in this case is obliged to protect and fulfill the basic needs of every citizen without discriminating and/or discriminating based on sex, ethnicity, religion, including minorities and vulnerable groups such as LGBT.

The protection that must be given by the State in the context of LGBT, which is related to basic rights in the form of the right to life, security, health insurance, education and employment, including equal rights before the law. if it is associated with the *ushuliyah* method, towards LGBT because medical factors (biological/genetic), are relevant to the human rights perspective, that they must be protected, embraced and treated without discrimination, and even need a psychological approach to them, so they can return to their human nature But the intended protection does not mean giving recognition and legality to their sexual orientation, especially to the marriage institution.

Protection of LGBT basic rights needs to be given because they are also human beings who have the same basic rights, so to avoid the occurrence of violence against LGBT, such as cases where LGBT are excluded from work because they are considered abnormal, or isolated from society because they are considered "viruses" between them experiencing physical violence. YuliRistinawati, as quoted in RustamDahar's article Karnadi Apollo Harahap also explained in a study conducted by LGBT activists, there were 89.3% of LGBT people in Indonesia experiencing violence, and about 17% of them had a tendency to commit suicide. Violence is mostly from family or friends. In this case, Yuli said that many cases that occurred in the LGBT community were forced to leave school because they could not stand the pressure of bullying in their schools.¹⁷



Whereas for LGBT activities and movements that commit sexual deviations, then with *the ushululfiqh* approach, they must be prevented and prohibited and even deserve the heaviest punishment, namely the death penalty. Because LGBT sexual behavior is a deviation from human nature and nature. Their behavior influences aberrant understanding of sexuality, because it is not in line with the basic principles of life, so there is a disruption of social functioning.

Preventing and combating LGBT sexual behavior in Indonesia is not a violation of human rights. This is as already explained that in carrying out human rights, a person must also be subject to restrictions set by law.¹⁸ The implementation of human rights must therefore not conflict with the values of religion, culture and basic state, namely Pancasila.

Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia regulates the right to form a family,¹⁹ however, the right to marry and have a family is not to justify a marriage. Based on Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia as mentioned above, what constitutes a human right is to form a family to continue the descent, which can be done legally through a marriage institution.

The definition of marriage is clearly stipulated in Article 1 of Law No. 1 of 1974 concerning Marriage (henceforth read: Marriage Law)²⁰ Article 1 The Marriage Law reflects that marriage recognized by the State of Indonesia is a marriage conducted between men and women based on the teachings of the religion adhered to. The definition of marriage as stipulated in the Marriage Law in Indonesia is in line with the concept of Islam which requires marriage between the opposite sex, men and women, not merely to fulfill biological desires but as a sacred bond to create peace of life by forming a family of *sakinah, mawaddah and rahmah* (QS. Ar-Rum verse 21) and develop a descendant of human dignity (QS. An-Nisa verse 1).



Marriage aims to preserve humanity. This is certainly very contradictory when compared to LGBT groups, who like same-sex. Same-sex marriage will never produce offspring and on the contrary it threatens the extinction of the human generation. Same-sex marriage is solely for channeling animal lust satisfaction. The Marriage Law takes into account the basis of religion, namely Belief in the One and Only God, which is one reason to strengthen the view of Islamic law regarding LGBT which is forbidden by Allah SWT. It can be concluded that it is not justified if LGBT people become legal in Indonesia, considering that Indonesia is a legal country with people who respect their traditions and religions.

LGBT if legalized will have an impact on various problems, namely; first: declining birth rates because certainly same-sex people will not be able to produce offspring, Second: causing anxiety among people who feel the security of their lives disturbed due to LGBT behavior, Third: causing the integrity of the nation due to the existence of pro and contra LGBT groups, Fourth: moral declaration Fifth: endanger health because it can lead to anal cancer, oral cancer, meningitis and even to HIV AIDS, Sixth: disturbing security by increasing rates of sexual abuse, especially in children.

The perpetuation of LGBT behavior as well as rape, adultery/infidelity, and free sex therefore does not have a place in the Indonesian legal umbrella. All of that not only causes evil to one or two people, but also evil for the breeding of generations. This behavior has eliminated the human values of sexual behavior that is blessed with *Allah SWT*.

The Criminal Code which is a Dutch colonial product is indeed not yet fully used as a basis for punishment for LGBT. Several articles on adultery are contained in Articles 284, 285 and 292 of the Criminal Code.²¹ The meaning of adultery is still interpreted narrowly in the Criminal Code, which is for those who make connections as long as they are still tied to the marriage rope. Meanwhile, if the sexual relationship is carried out by those who are not yet bound by the marriage rope, Article 284 cannot be imposed. One article that can ensnare LGBT groups is Article



who seemed to be watching" (Al Bukhari). Furthermore the hadith originated from AbdurRahmanibn Said al Khudri from his father, that the Prophet said: "It is not permissible for a man to see a man's nakedness and not a woman to see a woman's genitalia, not a man with skin in a garment and not a woman with skin woman in one outfit "(HR. Muslim).

Against the two hadiths above, according to Imam al-Nawawi it is a prohibition that contains haram law. This becomes an argument forbidden to touch the same-sex aurat in any part. This law became the agreement between cleric Imam al Nawawi al MinhajSharhShahir Muslim.²⁸ In addition, there are hadiths from Abu Musa, saying the Prophet Muhammad: "If a man associates men then they commit adultery, and if women associate with women, then they commit adultery" (Al Bayhaqi).

Based on the verses of the Qur'an and the hadiths above, the scholars agree that "liwat" and all same-sex relations are haram. Fatwa of the Indonesian Ulema Council No. 57 of 2014 concerning Lesbian, Gay, sodomy and sexual abuse explicitly states that the perpetrators of sodomy (gay) and lesbians are illegitimate and are a form of crime, subject to ta'jir punishment whose sentence can be maximal, namely up to the death sentence. Likewise in the case of victims of crime (jarimah) homosexuals, sodomy, molestation of the perpetrators of children is also subject to punishment until the death sentence.

While related to transgender, based on the MUI Fatwa in 1980 issued a fatwa on sexual change / improvement operations. In the fatwa, three things were decided as follows: 1) Changing male sex to female or vice versa, the law is *haraam*, because it contradicts the Qur'an Surahan-Nisa verse 19 and contradicts the soul of the *shara* '. 2) People whose sex is replaced by the legal position of the same sex as the original sex before being changed. 3) A *khunsa* whose manhood is clearer may be perfected by his manhood, and vice versa and his law becomes positive for men.

Regarding the punishment for similar relations, the Prophet SAW said the Prophet in the hadith narrated from Ibn nu Abbas: From Ibn



'Abbas Radhiyallahuanhuma, he argued, the Raslullāh SAW said,"
Whoever you get commits homosexual acts, then kill both perpetrators."

Knowing the punishment for the perpetrators of homosexual practices, it was very clear that the act was very cruel and the punishment was very painful and severe. There is no gap for the community to say that LGBT is a norm and is permissible in Islam. Islam recognizes the lust of human sexuality as an inseparable part of the essence of humanity. Fulfillment of biological needs must be in line with religious provisions, namely sexuality is only justified if done with the opposite sex and through the mechanism of marriage.²⁹ Islam has arranged in such a way about the procedure of channeling or expressing sexual orientation with correct sexual behavior. In the Qur'an it is explained that humans must guard their genitals and channel sexual desire only in a way that is justified by syar'i, as explained in the word of God in QS. An-Nur verses 30-31, QS. Al-Mukminun verses 5-6, QS. al-Ma'ārij: 29-30.³⁰

The verses explain that Islam has regulated how the people channel sexuality orientation in accordance with the provisions of God, namely only towards husband and wife in a legitimate marriage bond. Having same-sex intercourse is adultery, this is explained in the hadith of Abu Mūsā, the Messenger of Allah said: "If a man associates men, then both of them commit adultery, and if women associate with women, then both adultery" also in the hadith originating from Wāthilahibn al-Asqa ', said: "the sexual relations of women with their fellow women are adultery" (HR. al-Bayhaqi).³¹

D. Analysis of QawaidulFiqhiyahAbout LGBT Phenomena

Qawaid al Fiqhiyah is the basics or principles related to problems or types of *fiqh*.³² Analysis of Proposal of Jurisprudence on LGBT phenomena in Indonesia can reduce these problems by reducing the substance and essence of Sharia law, because in addition to analyzing finished legal products, this method is required to know the basis of the problem and its



legal substance and not stop at formal law. Jurisprudence method will see a legal provision in the aspects of essential values of the law itself.³³

Some qawaidhfiqhiyah can be used as an approach in analyzing LGBT phenomena, namely the *maslahah* theory. Izzuddin bin Abd al Salam in his book *Qawaid al Ahkam fi Mushalih al Anam* said that the entire *sharia* is a problem. All *maslahat* are ordered by *sharia* and all *mafsadah* is prohibited by *sharia*.³⁴

The purpose of *syara* 'covers five basic principles, namely: protecting religion (*hifzu ad din*), protecting the soul (*hifzuannafsi*), protecting the mind (*hifzu al aqli*), protecting human sustainability (*hifzu an nasl*), and protecting property (*hifz al mal*). Protecting the five interests above is a problem and damage is a *mafsadah* (loss). Eliminating the things that *mafsadah* is a problem too.

Returning to LGBT issues, the LGBT movement is a matter that contradicts the goal of *syar'i*, which is to enforce benefit, one of which is by protecting human sustainability. LGBT as described is contrary to nature and destroys generations. According to the Jurisprudence rules that everything that can cause damage must be prevented (*ad dhororuyuzalu*) meaning: *kemudharatan* (danger) must be eliminated or avoided. The rule is based on QS.Al-A'raf verse 56:³⁵

The above method is also supported by other fiqh methods, namely: "*Dar'ulmafasiidimuqaddamunalajalbilmasholihi*" which means: rejecting the obligation (damage) must take precedence over enforcing benefit ". Next is the rule of *Fiqh* which reads: "*Jalbi al Masholihi Hall min Daf'i al Mafasidi*" which means: Enforcing benefit must take precedence over rejecting obedience. Based on the fiqh method, avoiding the demise of the LGBT movement by banning activities that lead to sexual deviation is a necessity, as well as prevention of its movements by banning similar sexual relations because al Quran has clearly prohibited similar sexual relations. The rule is strengthened by the rules of jurisprudence;



"*Sadduazzarai*" which means: Close the crime gap. So, all loopholes relating to LGBT must be closed so that there is no crime and deviation from *fitrah*, harmony, propriety, morality, and goodness in order to achieve a life full of dignity and normality.³⁶

For this reason, we do not want our generation to become extinct, because one of the *maqasid* as *sharia* is to preserve humanity by maintaining offspring, how can same-sex relationships produce offspring. While today, many of the modes that LGBTs do are by changing their genitals and asking for the establishment of courts of identity changes so that they can marry same-sex. On the one hand the right to self-identity is human rights, but on the other hand, the legality of identity change will create new problems with marital relations.

D. Conclusion

LGBT behavior that leads to same-sex sexual deviation if legalized will have an impact on the emergence of various problems, namely; first: declining birth rates because certainly same-sex people will not be able to produce offspring, Second: causing anxiety among people who feel the security of their lives disturbed due to LGBT behavior, Third: causing the integrity of the nation due to the existence of pro and contra LGBT groups Fifth: endanger health because it can lead to anal cancer, oral cancer, meningitis and even to HIV AIDS, Sixth: disturbing security by increasing sexual harassment rates, especially in children.

According to the Jurisprudence rules that everything that can cause damage must be prevented (*ad dhororuyuzalu*) meaning: *kemudharatan* (danger) must be eliminated or avoided, "*sadduazzara'I*" closes the crime gap. The rule is based on QS.Al-A'raf verse 56 which means: "do not make damage on the earth after God has fixed it and pray to Him with fear (not accepted) and hope (will be granted). Surely the mercy of Allah is very close to those who do good. "

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rejecting the obligation (damage) must take precedence over enforcing benefit ". Based on the *fiqh* method, avoiding the disadvantages of the LGBT movement by banning activities that lead to sexual deviation is a necessity.

The government should make a policy against sexual deviations by LGBT groups because; 1) there are feelings of people who are violated and harmed. 2) LGBT is contrary to religious norms, security and public order 3) the law is made for the community, so if the law is not good, then the community is not good too, but if the law is good, then the community will be good). For this reason, it can be said that the State is in an emergency so that it requires a Perppu for LGBT and adultery.

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