



Application of the Legal Maxim of *Al-Ashl fi Al-Ibdha 'al-Tahrim* to the Phenomena of Homosexuality

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Submitted : 2022-03-20

Accepted : 2022-05-20

Revision : 2022-05-12

Publish : 2022-05-30

Abstract: This research examines the phenomenon of homosexuality that is currently developing in the Western world and has even entered Indonesia. Many homosexual associations and organizations established in Europe and America, even in Indonesia are known as LGBT (Lesbian, Gay, Bisexual, and Transgender). Yet homosexuality is an extraordinary moral crime and a sign of moral degradation. The application of the principles of fiqh "*Al-Ashl fi Al-Ibdha' al-Tahrim*" (the original law on sex is haram) in responding to the homosexual phenomenon through the approach of *maqasid syari'ah*, then homosexuality is haram because it destroys religion, the human soul, reason, descent, and also destroy honor. The original law of jurisprudence on the issue of sex is haram, responding to the homosexual phenomenon that is against the teachings of Islam which requires marriage to the opposite sex. Of course homosexual offenders or even more broadly, LGBT (Lesbian, Gay, Bisexual, and Transgender) are always looking for justifications and arguments that justify these acts, even on human rights grounds. Even though this is very contrary to his nature as a human being.

Kata kunci: *Application; legal maxim; homosexuality*

Abstrak: Penelitian ini mengkaji fenomena homoseks sedang berkembang di dunia Barat bahkan sudah masuk ke Indonesia. Banyak perkumpulan dan organisasi homoseks yang didirikan di Eropa dan Amerika, bahkan di Indonesia dikenal dengan LGBT (Lesbian, Gay, Biseks, dan Transgender). Padahal homoseks merupakan kejahatan moral yang luar biasa dan pertanda degradasi moral. Aplikasi kaidah fikih "*Al-Ashl fi Al-Ibdha' al-Tahrim*" (hukum asal pada masalah seks adalah haram) dalam menjawab fenomena homoseks melalui pendekatan *maqasid syari'ah*, maka homoseks haram hukumnya karena merusak agama (*li hifz al-din*), jiwa manusia (*li hifz an-nafs*), akal (*li hifz al-'aql*), keturunan (*li hifz al-nasl*), dan juga merusak kehormatan (*li hifz al-'irdh*). Kaidah fikih hukum asal pada masalah seks adalah haram, menjawab fenomena homoseks yang bertentangan dengan ajaran agama Islam yang mensyariatkan nikah dengan lawan jenis. Tentunya para pelaku homoseks atau bahkan lebih luas lagi yaitu LGBT (Lesbian, Gay, Biseks, dan Transgender) selalu mencari pembenaran dan argumentasi yang membenarkan perbuatan tersebut, bahkan dengan alasan Hak Azasi Manusia. Padahal hal ini sangat bertentangan dengan fitrahnya sebagai manusia.

Keywords: *aplikasi; kaidah fikih; homoseksual*

Introduction

Islamic law is a legal system very suitable for humans because its formation always pays attention to the benefit of humans in dealing with various problems and challenges of life. In the legal formation, Allah knows the nature of the human soul and its ability to form morals. The morality in the Islamic teachings contains not only prohibitions and prevention but also encouragement to all followers of Islam to be pious persons.¹ The Islamic morality advocates good and eradicates evil. The morality is based on the Islamic view that humans by nature tend to do good because they were created from a holy natural process of which the substantial soul came from the divine substance of the Most Holy, Allah. Despite this, there could still be those who would vent their sexual desires without obeying the Islamic teachings. Such a biological devotion has violated the human nature.

Homosexuality was labeled as a dirty and immoral practice by religions but has recently turned into human practice and must be respected as part of respect for human rights. Islam recognizes that humans have a sexual desire. For this reason, Islam, through laws based on the Qur'an and Hadith, regulates distribution of biological needs through a marriage. Through the marriage, the existence of humans can be well preserved as the marriage regulates sexual relations between men and women with a legal bond in the form of monogamy and polygamy. For religious people, the marriage is must a means to avoid wrongdoing and to keep them away from sins.²

Islam recognizes that humans have a very great desire to have sex, especially with the opposite sex. For this reason, Islam, through its laws on the basis of the Qur'an and Hadith, regulates the distribution of biological needs through marriage. It is through the marriage that human's nature can well be maintained because the marriage regulates sexual relations between men and women with legal ties in the form of monogamy and polygamy. The marriage is an institution connecting hearts, maintaining the benefit, and combining loves between husbands and wives.

In Islam, the marriage is not only for the fulfillment of biological needs but also as a means for personal development to maintain the sanctity's nature. It regulates husband-wife's relations, rights and obligations, parental obligations. It thus could form a family as the basis of community life. Therefore, the Islamic law views marriage as having a high position in individual, family and community life. The Qur'an encourages marriage and opposes all forms of sexual fulfillment beyond the religiously legal provisions. This is what causes Islam to forbid free sexual relationships and other sexual relations that serve lust only.

Even though Islam has already regulated legal biological relationships, deviations still occur whether in the form of adultery, lesbian, or homosexual. This could happen because of uncontrolled biological impulses due to a lack of understanding and carrying out religious teachings.³ The sex instinct itself is the most powerful instinct which demands channeling. If the fulfillment is not satisfactory, then people would be in a state of shock and lose control over their lust, and sexual relations would arise beyond the religious law, such as homosexuality (liwath). Homosexuality could now be found in Indonesia as can clearly be seen in homosexual men's status in social media. which has even entered Indonesia and is openly circulating in social media. In fact, given the issues

¹ Sudirman, *Problematika Hukum Islam Kontemporer* (Jakarta: Lembaga Studi Islam dan Kemasyarakatan, 1994). H. 77.

² Muhammad Bayu et al., "HOMOSEXUAL CRIME TOWARDS CHILDREN IN BENGKULU PROVINCE VIEWED FROM ISLAMIC LAW PERSPECTIVE," *Bengkoelen Justice* 10, no. 2 (2020): 162-72.

³ Sayyid Sabiq, *Fiqh Al-Sunnah Juzu' VI* (Kuwait: Darul Bayan, 1968). H. 10-11.

regarding the relatively recent emergence of homosexuality as a distinct social identity, a strong ideological pre-commitment is not hard to find in revisionist thought.

According to Islamic laws, one of the subject categories of criminalization is the practice of homosexuality: *liwath* for same-sex male relations and *musahaqa* for same-sex female relationships. Islam considers these practices to be sexual perversions and subject to certain penalties. With regard to the discussion of homosexuality in Islam, the same-sex relationships are often associated with the discussion of the story of Lut in the Qur'an. In the verses it is mentioned that the male followers of the Prophet Lut exceeded their sexual limits orientation since they preferred men to women for sexual relations. Prophet Lut's job was to warn his men about their sexual misconduct in order to avoid God's punishment. These verses have been used to legitimize the prohibition of homosexuality in Islam.⁴

Seen from the establishment of the United Nations (UN) in 1945, until December 2008 no discussion could be found about the equal rights of Lesbian, Gay, Bisexual, Transgender (LGBT) rights regardless of sexual orientation or gender identity. At that time, a related statement endorsed by the European Union and initiated by the Netherlands or France was presented to the General Assembly. The statement, originally meant to be adopted as a resolution, prompted an Arab League-backed statement against the LGBT related rights. In 2011, the United Nations Human Rights Council passed its first resolution recognizing LGBT rights, which was followed up with a report from the UN Human Rights Commission documenting violations of the rights of LGBT people. Responding to the United Nations Universal Declaration of Human Rights (UDHR), the Cairo Declaration on Human Rights in Islam (CDHRI) provided an overview of the Islamic perspective on human rights and emphasized Sharia as the only source. CDHRI stated that its aim was to be a general guideline for Member States Organization of Islamic Countries (OIC).⁵ Even in developed countries like the United States of America, moral objections to homosexuality usually occur as in Muslim majority countries. Most of the six million American Muslims viewed homosexuality as deviation from the true nature of (heterosexual) humans.⁶

Homosexual men viewed the roles played by religious principles in influencing personal identities and meaning making. As a result, a religion could be contradictory to one's needs and intimate relationships. A discourse discussed homosexual and heterosexual male Muslims living in an Indonesian heteronormative society. In Indonesia, authorized parties could punish the homosexual men based on a religious text or a criminal law. For example, the Sharia Court in Aceh, Indonesia, sentenced two sexual men with dozens of lashes in front of public. Even the homosexual men considered that the same-sex relationships were not uncommon in Indonesia. However, religions have changed the way Indonesia people looking at homosexuality. During the Dutch colonial period, for example, Christianity viewed homosexuality as unreasonable, abnormal, and prohibited. Such a view then affected attitudes of the Dutch government toward same-sex relationships as a moral problem and a cause of God's punishment. In the literature there are several numbers of examples

⁴ Irma Riyani, "Research on (Women's) Sexuality in Islam," *ISLAMIKA INDONESIA* 1, no. 2 (2014): 1-18.

⁵ Umar Abubakar Dubagari, "Same Sex Marriage, Human Rights and Death Penalty: Common and Islamic Law Perspectives," *Journal of Philosophy, Culture and Religion* 23 (2016): 49-57.

⁶ Shafiqa Ahmadi, "Islam and Homosexuality: Religious Dogma, Colonial Rule, and the Quest for Belonging," *Journal of Civil Rights and Economic Development* 26, no. 3 (2012): 537-63.

showing how authorized parties punished suspected homosexual men by hanging, strangling, or drowning based on an operation of moral cleansing (*zenenschoonmaak*).⁷

Sexuality as a research topic in a Muslim society began as parts of orientalism academics. One of the unique examples was *L'éthique sexuelle de l'Islam* by Georges Henry Bousquet published in 1953. Bousquet's general focus was an assumption that Islam paid less attention to marriage as a stable moral and social institution. Since the very beginning the author has put an emphasis on differences between understanding about marriage and Islam⁸. Homosexual and homophobic issues in Muslim community were mostly discussed with regard to increasing visibility of LGBT-related activities. In the community, repressive attitudes towards LGBT were often in contrast with a looser pre-modern sexuality culture.⁹ Taken together, research studies into the introduction to and evolution of sexual deviations and homosexuality as one of the deviations accepted in Western societies should be counterbalanced with an application of legal maxim an instrument of Islamic laws.

This study belongs to library research based on relevant literature and internet-based resources related to this paper's central theme. The approach used in the discussion of this research is a philosophical law approach¹⁰ also known as *maqasid syari'ah* in the context of Islamic law, namely to refuse harm with the aim to create peace and prosperity as a prerequisite to achieving happiness in the world and hereafter.

Phenomena of Homosexuality

Homosexual is the word referring to people who are sexually interested in the people of same sex. Male sexually interested in male is often called as a gay man whereas female sexually interested in female is called a lesbian. According to the Islamic law, homosexuality is a heinous act and belongs to a major sin which damages ethics, nature, religion, and human spirit. Homosexuality is a biological relationship between the same sex, both male and female¹¹. The term homosexual has, however, been used for a same-sex relationship between men while the relationship between women is usually called lesbian.¹² The phenomena of homosexuality have developed in the Western world. Many homosexual associations and organizations have been founded in Europe and America, even in Indonesia, and well known as LGBT (Lesbian, Gay, Bisexual, and Transgender). It was reported that there were more than 600 cases found and guidance as well as recovery processes were given to homosexual men.¹³ Even results of a study by Ashgar Ali Muhammad and Yusuff jelly Amuda in Malaysia and Nigeria suggest that majority of the respondents agreed that LGBT violated human dignity, personality, and rights. Therefore, they strongly agreed that Sharia was the best law applied to Muslims committing LGBT crimes and the states or Muslim authorities should not legalize LGBT regardless threats or pressures from any country. Finally, a battle for human rights is a struggle for

⁷ Anan Bahrul Khoir, "LGBT, Muslim, and Heterosexism: The Experiences of Muslim Gay in Indonesia," *Wawasan: Jurnal Ilmiah Agama Dan Sosial Budaya* 5, no. 1 (2020): 1–19.

⁸ Bettina Dennerlein, "Sexual Rights and Their Discontents: Yūsuf Al-Qaraḍāwī on Homosexuality and the 'Islamic Family,'" *Journal of Arabic and Islamic Studies* 17, no. September 2013 (2017): 247–67.

⁹ Dennerlein.

¹⁰ Abu Yasid, *Aspek-Aspek Penelitian Hukum (Hukum Islam-Hukum Barat)* (Yogyakarta: Pustaka Pelajar, 2010). H. 79–80.

¹¹ Mustofa Hasan and Beni Ahmad Saebani, *Hukum Pidana Islam Fiqh Jinayah* (Bandung: Pustaka Setia, 2013). H. 313.

¹² Sabiq, *Fiqh Al-Sunnah Juzu' VI*. H. 427.

¹³ Henri Shalahuddin et al., "A Critical Study of Mukhannath's Law as a Homosexual Argumentation," *MEDIA SYARI'AH: Wahana Kajian Hukum Islam Dan Pranata Sosial* 23, no. 2 (2021): 109–26, <https://doi.org/10.22373/jms.v23i2.10340>.

restoring confiscated human rights in order to restore human dignity. Human rights should not be used for promoting illegal and immoral activities along with irrational behaviors contradictory to human nature. Mental, emotional and physical solutions of human race could generally be reached through a combination of male and female. LGBT, based on this clear refutation, was in contrast with the law of procreation.¹⁴

Every time something or somebody given the status of “natural” in terms of appearance and/or behavior, one is also given a power to decide what is right and wrong. Heteronormativity in a patriarchal world is a norm applicable to a sexual orientation and gender identity, and how a gender relation could, and should, be expressed. In a heteronormative patriarchal world, humans could be divided into two different and mutually complemented categories, namely male and female. Everyone should be either a man or a woman, and heterosexuality is the only “natural” sexual orientation. On the other hand, homosexuality as one of the deviations could be possibly acceptable but it could not be considered normal. There is an extreme imbalance in a power relation between female and male LGBT and heterosexual people. It means that the former would be positioned in a lower status than the latter in a society where they live. In a discussion about LGBT and inter-sex issues with people from parts of the world other than the West, it is important to remember that a definition of LGBT identity, as one may think of, might not be relevant or nobody could be invited to talk about the issues because some other ways of defining sexual practices are parts of the factors shaping an identity. Therefore, some challenges in discussing human rights and LGBT issues would not only connect a discourse of identity definition possibly taking place in non-Western cultures but also find methods of protecting human rights, fighting discrimination, promoting tolerance towards sexuality and gender concepts, defining a social room for changing identities, enabling people to live more freely without being stigmatized and marginalized because of different sexual orientations or gender identities. A starting point of defending human rights and promoting tolerance could be more clearer understanding on how people conduct and manifest their sexual practice, and if and how this is either parts or no parts of identity shaping factors.¹⁵

None of the world’s major religions openly reveal tolerant attitudes towards homosexuality. Religious leaders of Islam and Christianity, especially evangelical Protestantism, have shown a number of hate crimes and repressive attitude towards LGBT people. Muslim majority countries often show homophobia both in the UN system, in their constitutions, and at a family level. Some churches in cooperation with some Swedish religion-based organizations including some Swedish churches were reported as being homophobic. Even though this study did not explore the topic further, the results should be further examined. Some religious organizations were recorded as showing intolerant attitudes towards transgender and intersex. An inappropriate gender identity and an unidentified sex in a neonatal period is a challenge for religious holy books stating that humans are created as male and female. Religious belief about gender may affect even modern medicine and irreligiously affiliated people. One of the very direct ways for seeing the influence of religious intolerance to LGBT people are shown in the way the Vatican Holy See executed its intolerance at the United Nations. The problem has become more complicated as the influence of the Holy See at the UN is nearly

¹⁴ Ashgar Ali and Ali Muhammed, “LGBT: An Evaluation of Shariah Provisions and The Laws of Malaysia and Nigeria,” *Global Journal Al-Thaqafah: GJAT* 8, no. 1 (2018): 15–29.

¹⁵ Lotta Samelius, *A Study of Policy and Administration Sexual Orientation and Gender Identity Issues in Development* (Sweden: SIDA, 2005). H. 15-16.

the same as other full member states in spite of its status as a formal observing member. Many observations suggest that religious organizations, structures, and persons often do tolerate LGBT and intersex people. It cannot be concluded, however, that LGBT people are less religious than other people. Conflicts over beliefs, gender identity, and sexual orientations often become a theme in a counseling process. That is why belief is one of the main aspects to be considered in handling LGBT issues, particularly in planning activities in combating a stigma and discrimination.¹⁶

It is very clear that homosexuality is an extraordinary moral crime and a sign of moral degradation.¹⁷ Homosexuality is done by inserting the testicles into the anus whereas lesbians are done by masturbating each other, or other methods, in order to have an orgasm (climax of the sex act). Homosexuality is banned by the world's major religions because that it not only violates a marriage institution but also dishonors humans and contradicts the nature of human creation. Mental, emotional and physical solutions of human race could generally be reached through a combination of male and female. LGBT, based on this clear refutation, is in contrast with the law of procreation. Even though some countries have legalized homosexuality, many countries still find it abnormal, irrational, unethical, and unacceptable on the basis of their religious principles, culture, and traditions.¹⁸

Universally, for Jews, Christians, and Muslims, the story of Sodom is a centre for the traditional condemnation of male homosexuality. Even Allah's punishment in the forms of rain of fire and brimstone on Sodom, Gomorrah, and other surrounding cities, suggests how ugly and despicable homosexuality was. Even there are at least three fiqh thoughts of criminal sentences related to homosexual offences. The first thought declares that homosexual offenders should be given a death sentence. The second one states that homosexual offenders should be punished the same as the offenders of extra-marital intercourse. If the offenders are *bikr* (unmarried women), they will be whipped and forced into exile from her home country. On the other hand, for those who are *muhsan* (married persons), they will be stoned. The last thought announces that homosexual offenders should be given a penalty in the form of *ta'zir*.¹⁹

Besides, the sublimation of homosexuality packed in the term of same-sex marriage (also known as a gay marriage) is a marriage between two people with the same biological sexes and or gender identities. Legal recognition of the same-sex marriage is sometimes called as a marriage of equality or an equal marriage. Recently, the term "same-sex marriage" has replaced "gay marriage". The latter was considered less valuable for the union of two same-sex couples and was also more bisexually inclusive. Same-sex marriages have been documented in many societies not subject to religious influences. In China, especially in the province of southern Fujian where male love was especially celebrated, an elder man would marry a younger man in a complicated ceremony. The marriage would last several years and eventually the older partner would help the younger one finds a wife (girl) and settle down to raise a family. In Africa, among the Congolese Azande, an elder man could marry a younger man for whom the elder man has to pay a dowry to the younger man's father. This type of marriage is also understood as a temporary one. Legal recognition of marriage opens

¹⁶ Samelius. H. 26-27.

¹⁷ A. Rahman I. Doi, *Penjelasan Lengkap Hukum-Hukum Allah (Syari'ah)* (Jakarta: PT. RajaGrafindo Persada, 2002). H. 317.

¹⁸ Ali and Muhammed, "LGBT: An Evaluation of Shariah Provisions and The Laws of Malaysia and Nigeria."

¹⁹ Bayu et al., "HOMOSEXUAL CRIME TOWARDS CHILDREN IN BENGKULU PROVINCE VIEWED FROM ISLAMIC LAW PERSPECTIVE." H. 170-171.

up various rights, including social security, taxation, inheritance, and other benefits not available to unmarried couples before the law. Restricting legal recognition to heterosexual unions could exclude same-sex couples to gain legal access to these benefits. When an unmarried opposite-sex partner without other legal barriers has an option to have a marriage legally and gain access to these rights, the option is not available to same-sex couples. In some cases, the lack of legal recognitions also made it difficult for same-sex couples to adopt children. In many countries where a same-sex marriage is legal, same-sex relationships are differently treated such as having unequal age, consent, or marriage bans. In Russia, for example, the laws prohibit the promotion of “non-traditional” sexuality for under 18s.²⁰

According to psychologists, the effect of such sexual deviations as homosexuality was that there would be no desire to have a marriage. If any of them are married, he would order the man he likes to have sex with his own wife as long as the man is willing to have sex with him in a homosexual manner. If there is an old homo who is unable to come to a man, he himself would invites his partner and pay a certain amount of money in return. As a result of this behavior, women would also be dissatisfied with having sex with men and have desire to have sex with other women.²¹

In addition to the danger to the homosexuality perpetrator personally, homosexuality also endangers society. If people are reluctant to marry and vent their sexual desires illegally, it would automatically destroy the family system, weaken morals, and loosen the bonds of religious values and norms. Finally, they could bring unlimited freedom as can be seen in today’s society.²² Regarding the phenomena, Muhammad Qutb stated that moral was inseparable from reality and the theories studied in the “ivory tower” cannot be separated from the rules of real life. There cannot be moral difficulties if people’s lives run according to the right norms. When life is damaged, morals are damaged, and when morals are damaged, life is damaged. Both of them are a rule based on the human form as a whole and perfect nature.²³

To avoid the negative consequences of homosexuality, moral development in accordance with religious norms and values is needed. And the formation of right morals is a utopia as long as the principles and systems applied are materialistic in nature which are contrary to the religious principles and systems.²⁴ The loss of religious sense in people’s lives and the triumph of the materialism laws belong to factors that cause sexual deviations. Religious leaders and medical experts are trying hard to overcome and prevent sexual deviations. In April 1964, 140 Sweden medical specialists submitted a memorandum to parliament to urgently address the sex disorder threatening the health and stability of society. The same thing also take place in England in 1976, especially from women, who demanded that the government had to straighten people’s morals.²⁵ The demand received a response from the government but the government was unable to stem sexual deviance because the situation was very severe, rooted in the detachment of religious values and norms in all aspects of people’s lives.

The influence of liberalism and secularism has led to the view that everyone has the right to recognition everywhere as a person before the law. People with different sexual orientations

²⁰ Dubagari, “Same Sex Marriage , Human Rights and Death Penalty : Common and Islamic Law Perspectives.” H. 50.

²¹ Hamka, *Tafsir Al-Azhar* (Jakarta: Panjimas, 1979). H. 290.

²² Sayyid Sabiq, *Fiqh Al-Sunnah* (Libanon: Darul Fikri, 1981). H. 431.

²³ Fathi Yakan, *Islam Dan Seks* (Jakarta: Al-Hidayah, 1989). H. 16-17.

²⁴ Yakan. H. 4.

²⁵ Yakan. H. 10-12.

and gender identities would enjoy legal rights and abilities in all aspects of life. Everyone's self-determined sexual orientation and gender identity is an integral part of their personality and one of the most fundamental aspects of self-determination, dignity and freedom. No one could be forced to undergo medical procedures, including sex reassignment surgery, sterilization, or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, can be filed as such to prevent the legal recognition of a person's gender identity. No one could be under pressure to hide, suppress, or deny their sexual orientation or gender identity. There is even misunderstanding with regard to the context of homosexuality in understanding the concept of *hifdz al-nafs*. Some people thought they had the right to live and develop their lives. Minorities of gender and sexual orientation are still human beings created by God who have various rights. It is right for anyone to respect and protect those rights. At this point, it becomes increasingly clear that both Islam and human rights support humanity with the protection of life and dignity. Islam and all religions equally must support anyone, not discriminate against certain groups, in this case homosexual people. This is an effort to manifest Islam as *rahmah li al-'alamin*. That is Islam which could give peace and life to everyone. This is what Allah says in the Qur'an Surah Al-Anbiya (the Prophets) verse 107.²⁶

The existence of arguments regarding homosexuality could not be separated from the issue of the human rights of LGBT and intersex people which is often discussed within the framework of the Universal Declaration of Human Rights, through the UN General Assembly Resolution 217A(III) on December 10, 1948. UDHR states "the inherent dignity and ... the equal and inalienable rights" of all members of the human family are the basis of freedom, justice and peace in the world. "Human rights are inalienable rights owned by a person simply because he or she is a human being." This means that one could not lose these rights just as one could not stop being human. That human rights are indivisible means that one could not deny rights because they are "less important" than other rights. Human rights are also interdependent. This necessarily means that all human rights complement and strengthen one another. Furthermore, human rights could be defined as the basic standards that people need to live with dignity. Violating someone's human rights means treating that a person as less than a human.²⁷

While the UDHR and subsequent international human rights documents do not explicitly mention sexual orientation or gender identity, evolving conceptions of international human rights law include interpretations to include the rights and protection of LGBT people in the world. These include successful legal arguments based on the right to privacy (UDHR, Article 12; ICCPR #17), equality (UDHR, Article 7; ICCPR #26), and freedom from discrimination (UDHR 7, ICCPR #2). Given the nature and extent of human rights violations against LGBT people documented worldwide, the UDHR such as Freedom from Arbitrary Arrest (Article 9), Right to Asylum (Article 14), Right to Life, Freedom and Personal Security (Article 3), Right to be Free from Torture and Degrading Treatment (Article 5), and Right to Peaceful Assembly and Association (Article 20) have also been successfully referenced in human rights cases involving LGBT people (Ref. Amnesty International USA). The basis of human rights and LGBT issues is the recognition of the existence of LGBT and intersex people. Without positive acknowledgment that the people exist, it is almost impossible to claim and fight for

²⁶ Muhammad Khusnul Khuluq, "The Harmonised Shari'ah and Human Rights on Lesbian, Gay, Bisexual and Transgender (LGBT)," *Ulumuddin: Journal of Islamic Legal Studies* 13, no. 1 (2020): 1-23.

²⁷ Samelius, *A Study of Policy and Administration Sexual Orientation and Gender Identity Issues in Development*. H. 14.

the protection and exercise of their human rights in a certain country. To be recognized as individuals with full human rights in a non-discriminatory manner, LGBT and intersex people must have the ability to participate and be seen at all public levels. In order to be able to have full accountability, they must be given the opportunity for public speaking and decision-making processes.²⁸

Homosexuality is a moral disorder. It is also a moral disease, a sin and a heinous act. No one was born homosexual just as no one was born a thief, a liar, or a murderer. People acquire this evil habit due to lack of proper guidance and education.²⁹ Islam stipulates that legislation and law are basically educational and preventive in nature which could guarantee individual and social harmony. The legal sanctions imposed by Islam are one of the available methods. By implementing this punishment, the community could be protected from various crimes and irregularities. Law is a barrier before crime take places and prevention after it. By knowing the legal sanctions of a crime, a person could be prevented from committing any crime. The implementation of punishment for those who commit crimes such as homosexuality could prevent them from repeating such acts³⁰ and would create legal awareness for other members of the community to avoid such acts or other sexual deviations.

Another lesson drawn from the prohibition of homosexuality is to maintain the marital institution. If homosexuality is not eradicated or prohibited by law, it could destroy human nature as the vicegerent of Allah and violate the sunnatullah and His laws. In Islam, marriage is a humane and commendable way to channel everyone's sexual desires and does not cause harm to society. Marriage is a natural base, a place where men and women meet in their search for spiritual and physical tranquility.³¹ In addition, it provides a safe way for the sexual instincts to produce good offspring. Islam recognizes that the sex instinct is one of the most powerful and harsh instincts demanding a way out. If the need is not satisfied then humans would experience a biological shock and could lead to various sexual deviations. Therefore, marriage is the best and most appropriate way to channel sexual instincts.

Islam prohibits a male-male sexual behavior and this also includes a lesbian behavior. Such actions are considered as something contrary to the nature according to what God created for humans. God's creation is generally in pairs. The complete phenomenon is generally divided into two complementary parts. Humans, as a complete entity, is divided into male and female. The mental, emotional and physical completeness of humans could generally be achieved through the combination of a man and a woman. On the contrary, homosexuality and lesbianism are based on a refutation of this obvious fact. It, therefore, contradicts the nature where humans were created.³²

If the sexual instinct is not channeled through marriage, then humans will experience chaos. Adultery, for instance, would bring chaos to kinship relations because a born child does not have a clear lineage from a father's lineage. Likewise, homosexuality would eliminates human nature and destroy the family system and society, and even cut off the human's next generation. Because male-male sexual relationships could not generate offspring. Meanwhile, women would also lose the opportunity to satisfy their biological needs. This kind of loneliness would lead to sexual deviation

²⁸ Samelius. H. 15.

²⁹ Muhsin Hendricks, "Islamic Texts : A Source for Acceptance of Queer Individuals into Mainstream Muslim Society," *The Equal Rights Review* 5 (2010): 31-51.

³⁰ Yakan, *Islam Dan Seks*. H. 59.

³¹ Yakan. H. 28.

³² Ali and Muhammed, "LGBT: An Evaluation of Shariah Provisions and The Laws of Malaysia and Nigeria."

among women themselves. This would encourage them to have female-female sexual relationships. This attitude would prevent their marriage with men. If this happens, then the whole social order will be destroyed.

Application of *Al-Ashl fi Al-Ibdha' al-Tahrim* Fiqh Rules in Answering the Homosexuality Phenomena

Homosexuality deviates from human nature because human nature tends to heterosexual biological relationships, namely sexual relations between men and women. Homosexual acts are not only found in modern times but could be found at the time of the Prophet Lut³³, as mentioned in the Qur'an Surat Al-'A'raf [7:80-84].

According to Muhammad Rashfi in his book entitled *Al-Islam wa al-Thib* as quoted by Sayyid Sabiq, Islam strictly prohibits homosexuality, because it has a negative impact on people's private lives such as:

1. A homosexual has no desire for women. If they marry women, their wives would not get biological satisfaction because their husbands' lust has been spilled when they have homosexual relationships with other men they want. As a result, the husband-wife relationships would become tenuous along with could not grow a sense of love and affection and produce offspring even though the wives are fertile and able to give birth.
2. Feelings of love with the same sex could bring mental disorders leading to a strange attitude and behavior. A homosexual sometimes behaves as a boy and sometimes as a girl.
3. Resulting in damage to the nerves of the brain, weakening will and eliminating morale.³⁴

In addition to the above negative consequences, another consequence worth noting is the outbreak of HIV/AIDS which are very dangerous for a person's health. HIV/AIDS disease spread all over the world has been quite shocking for the perpetrators of sexual deviance because its medicine is still difficult to find.³⁵ People with HIV/AIDS could lose their immune system due to virus attacks eating away at the blood vessels, body, and genitals. In addition to HIV/AIDS, there is also another venereal disease, namely syphilis. According to many experts, this disease is transmitted through sexual intercourse, such as zina, homosexuals, and lesbians. Syphilis germs grow through wounds and spread quickly. This disease is very dangerous, the sufferer could be paralyzed due to a weakened immune system and lead to death.³⁶

A sexual deviation in the form of homosexuality is not only done by atheists who deny the existence of God and oppose the Day of Resurrection but also by religious people who believe in the existence of God and afterlife. This is because nowadays the human civilization has gone far towards materialism, abandoning religion and spiritual values in society as well as animal instincts.³⁷ Even though the people of Lut were destroyed by Allah hundreds of centuries ago, homosexuality still exists in the midst of human life. The harsh torment inflicted on the people of Lut was not taken as

³³ Doi, *Penjelasan Lengkap Hukum-Hukum Allah (Syari'ah)*. H. 315.

³⁴ Sabiq, *Fiqh Al-Sunnah*. H. 361-365.

³⁵ T O M Boellstorff, "Between Religion and Desire : Being Muslim and Gay in Indonesia," *American Anthropologist* 107, no. 4 (2005): 575-85.

³⁶ Yakan, *Islam Dan Seks*. H. 47 dan 71.

³⁷ Murtadha Mutahhari, *Manusia Dan Agama* (Bandung: Mizan, 1984). H. 58.

a lesson. Even today's world is hit by a sex revolution that goes far beyond the religious boundaries and provisions. Even since the Prophet Muhammad's era, all Muslim scholars have agreed that the practice of homosexuality is a forbidden act and a sin. Homosexuality is illegal and belongs to Hadd's punishment. It is therefore categorized as the same as offenses such as adultery. Under the Sharia law the penalty for homosexuality is death, although there is a disagreement over the style of execution. This view is held by most schools of Islamic thought. Execution by stoning is justified on the grounds that the God used sulfur to destroy the notorious cities of Sodom and Gomorrah. I hereby would like to examine the concept of stoning to death for adultery and in light of the Islamic principle that Sharia law should not conflict with the Qur'anic injunction proving that the death penalty for any sexual offence is not a Qur'anic concept. This implies that the killing of homosexuals is therefore also un-Islamic.³⁸

Those who commit sexual perversion and immerse themselves in the pleasures of lust will fade their religious feelings and get further and further away. It is stated by the Qur'an that when human hearts' have been engulfed with sin, then the faith in their hearts will fade and would not be able to receive God's guidance as stated in the Qur'an Surat Al-Munafiqun (the Hypocrites) verse 6. According to Islamic laws, homosexuality related laws belong to a special study in the field of *al-ahwal al-syakshiyah* (family law). *Al-ahwal al-syakshiyah (munakahat)* is a field of Islamic jurisprudence that specifically discusses the provisions of Islamic law on family ties including sexual relations.³⁹ Regarding sexual intercourse, the arrangement can be seen in terms of the following rules of jurisprudence:

الأصل في الإيضاع التَّحْرِيمُ

Translation: The original law on sexual issues is haram (illegal or forbidden)⁴⁰.

The rule means that a sexual intercourse is originally forbidden until there are clear reasons and, without a doubt, what could justify it is with the existence of a marriage contract⁴¹. The basic law of sex is haram (illegal). Therefore, a sexual intercourse can only be done (and even must be done) after the marriage contract between a man and a woman⁴². The provisions are completed or enhanced with the following rule:

الأصل في الأيضاع التَّحْرِيمُ وَالتَّكَاحُ بِأَبِهَا

Translation: The basic law of having intercourse is haram and marriage is the key⁴³.

According to Asy-Syathibi, the *maqasid of al-syari'ah* is to maintain the religion (*li hifz al-din*), human soul (*li hifz an-nafs*), intellect (*li hifz al-'aql*), descendants (*li hifz al-nasl*), and wealth (*li hifz al-mal*) without restricting individual freedom. In addition, it is for maintaining honor (*li hifz al-'irdh*), and environment (*li hifz al-bi'ah*)⁴⁴. *Maqasid al-syari'ah* is used as a measure of whether the Sharia (law) applied is true or not. If the law applied turns out to fall short of one of these criteria, then

³⁸ Peters R., *Crime and Punishment in Islamic Law* (Cambridge: Cambridge University Press, 2006). H. 61.

³⁹ Ahmad Sukarja and Mujar Ibnu Syarif, *Tiga Kategori Hukum Syariah, Fiqih, Dan Hukum* (Jakarta: Sinar Grafika, 2012). H. 86.

⁴⁰ Djazuli, *Kaidah-Kaidah Fiqih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis*. H. 122.

⁴¹ Djazuli. H. 123.

⁴² Jaih Mubarak, *Kaidah Fiqh Sejarah Dan Kaidah Asasi* (Jakarta: PT Raja Grafindo Persada, 2002). H. 136.

⁴³ Mubarak.

⁴⁴ Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Syariah* (Bandung: Mizan, 2015). H. 57.

the existence of the law needs to be reviewed, including in terms of the application of the rules of jurisprudence on sex including about homosexuality. If tested with the rules through the approach of *maqasid al-syari'ah*, homosexuality is then haram (forbidden) because of damaging religion (*li hifz al-din*), human soul (*li hifz an-nafs*), intellect (*li hifz al-'aql*), progeny (*li hifz al-nasl*), and honor (*li hifz al-'irdh*).

Furthermore, it could further be explained that homosexuality is against the Islamic teachings which stipulate marriage with the opposite sex. This also applies if viewed from a health perspective because homosexuality could cause HIV/AIDS damaging the human soul in contrast with *maqasid al-syari'ah* (*li hifz an-nafs*). In addition to causing damage to the soul caused by homosexuality, this destroys the mind, contrary to *maqasid al-syari'ah* (*li hifz al-'aql*). As for its relationship with the biological relationship of human reproduction, homosexuality could cause the destruction of offspring which is contrary to *maqasid al-syari'ah* (*li hifz al-nasl*). Besides, the author is of the opinion that, in a social perspective, homosexual actors also known as gays will damage the social order in a social culture that upholds morality and religion. This in turn results in the destruction of the honor of homosexual people which is contrary to *maqasid al-shari'ah* (*li hifz al-'irdh*).

Conclusion

Homosexuality is a biological relationship between the same sex, both male and female. The term homosexual is however more frequently used for sexual relationships between men while those between women are called lesbians. The phenomena of homosexuality have developed in the Western world and has even entered Indonesia. Many homosexual associations and organizations founded in Europe, America, and even Indonesia are known as LGBT (Lesbian, Gay, Bisexual, and Transgender). In fact, homosexuality is an extraordinary moral crime and a sign of moral degradation. Based on the application of the *Al-Ashl fi Al-Ibdha' al-Tahrim* rules in responding to the homosexuality phenomena through the *maqasid al-shari'ah* approach, it could be concluded that homosexuality is unlawful because it destroys religion (*li hifz al-din*), human soul (*li hidz an-nafs*), intellect (*li hifz al-'aql*), lineage (*li hifz al-nasl*), and honor (*li hifz al-'irdh*). That the original rule of jurisprudence on sexual matters is haram (forbidden or illegal) could respond to the homosexuality phenomena which is contrary to the Islamic teachings highlighting a marriage of the opposite sex. Of course, homosexual people or even more broadly, LGBT (Lesbian, Gay, Bisexual, and Transgender) always look for justifications and arguments to justify their actions, even on the grounds of Human Rights. Yet this is very contrary to nature as a human being.

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