

Law Enforcement Against Lesbian, Gay, Bisexual, and Transgender (LGBT) Phenomena in the Qanun Jinayah in Aceh

Khairani

Abstract: *Law Enforcement Against Lesbian, Gay, Bisexual, and Transgender (LGBT) Phenomena in the Qanun Jinayah In Aceh.* This study revealed the implementation of Islamic Law in Aceh, especially those relating to Lesbian, Gay, Bisexual, and Transgender (LGBT) Phenomena. The aim is to find out how the law is enforced and what things hinder its application. Although Aceh has enacted Islamic Shari'a, and Aceh's Jinayah Qanun has banned LGBT actions through which the perpetrators are subject to sanctions the whip, but the phenomenon of LGBT in this Province still exists. The study found the fact that the Jinayah Qanun in this region had not been fully able to ensnare LGBT perpetrators, especially Lesbians (*musâhaqah*) and homosexual (*liwâth*). This is because of two main obstacles: first, the formal aspects involving the evidentiary side, and second the material aspects relating to legal rules that can be used to punish the perpetrators of these crimes.

Keywords: Islamic law in Aceh, LGBT, Aceh, Qanun

Abstrak: *Penegakan Hukum Terhadap Fenomena Lesbian, Gay, Biseksual, dan Transgender (LGBT) di Qanun Jinayah di Aceh.* Penelitian ini mengungkap tentang pelaksanaan Hukum Islam di Aceh terutama yang berkaitan dengan fenomena Lesbian, Gay, Bisexual dan Transgender (LGBT). Tujuannya untuk mengetahui bagaimana hukum itu ditegakkan dan hal-hal apa saja yang menghambat penerapannya. Meskipun Aceh telah memberlakukan Syariat Islam, dan Qanun Jinayah Aceh telah melarang perbuatan LGBT lewat mana pelakunya dikenakan sanksi *uqubat* cambuk, namun fenomena LGBT masih tetap muncul di Provinsi ini. Penelitian menemukan fakta bahwa Qanun Jinayah di wilayah ini belum sepenuhnya mampu untuk menjerat pelaku LGBT khususnya Lesbian (*musâhaqah*) dan homoseksual (*liwâth*). Hal ini dikarenakan adanya kendala pada 2 aspek yaitu: aspek formil, yang menyangkut sisi pembuktian, dan aspek materil, yang berkait dengan aturan hukum yang dapat digunakan untuk menindak pelaku perbuatan pidana tersebut.

Kata Kunci: hukum Islam di Aceh, LGBT, Aceh, Qanun

Introduction

The LGBT phenomenon is not really a new problem because this phenomenon has happened in ancient times as explained by the Qur'an in the story of the Prophet Loth AS. Now, the names or other terms that are similar in meaning to that have arisen along with the rise of news about LGBT both on television, and mass media.

LGBT stands for Lesbian, Gay, Bisexual, and Transgender. In the Indonesian Dictionary, the term Lesbian is interpreted as a woman who is sexually attracted to the same sex.¹ Whereas Gay refers to the tendency of a man to like the same sex or declare someone who is sexually attracted to individuals of the same type as himself.² Meanwhile, the term bisexual refers to someone who has several physical characteristics of the genitalia of both sexes (hermaphrodite) or has two sexes namely the sexes of men and women as well.³ While Transgender is an identity/gender inequality in a person against the sexes appointed to him. Transgender is not a sexual orientation. A transgender person can identify himself as heterosexual, homosexual, bisexual, or asexual.

Although the Aceh province has implemented Islamic law in full, it turns out that the enactment fails to prevent the emergence of the LGBT community. Some local media have often even described the occurrence of same-sex marriage, namely men to men or women to women.

LGBT behavior and same-sex marriage are a serious threat to family institutions and endanger the social fabric of human society. Therefore this trend should be watched out for by monitoring and controlling all of their activities to save the next generations and fortify relatives with a comprehensive understanding of religious knowledge.⁴ If the indications of LGBT group movements are not dammed, this could threaten the majority of Indonesia's young Muslims. This threat can arise because

¹ Kepustakaan Nasional, *Kamus Besar Bahasa Indonesia: Edisi Baru* (Jakarta Barat: Pustaka Phoenix, 2007), p. 538.

² Kepustakaan Nasional, p. 332.

³ Kepustakaan Nasional, p. 136.

⁴ Kepustakaan Nasional, p. 136.

this LGBT not only has the consequences of the coming of punishment from Allah SWT but also become a disease and deviation of behavior that is dangerous for the younger generation.⁵

This research is descriptive in nature, which is describing the symptoms in the community against the case under study. The approach used is a qualitative approach which is a research procedure that produces descriptive data. This research uses normative legal research methods, which is a research method conducted by examining existing library materials.⁶ The aim is to understand the phenomenon under study, to relate to the material and formal law in Indonesia as well as to seek the opinions of scholars on the topic.⁷

The core issues revealed in this study include: (1) How does the Penal Code and Jinayat Qanun Number 6 of 2014 concerning Jinayat Law and Qanun Number 7 of 2013 regarding Procedural Laws formulate *liwat* and *musâhaqah* criminal acts to ensnare LGBT perpetrators? (2) How are the efforts to uphold Islamic law by the Satpol PP (City Police Unit) and WH in Aceh Province against LGBT perpetrators and what are obstacles to their proof related to the Qanun Jinayat?

Terminology

In general, the mention of humans experiencing sexual disorders is called LGBT. Part of it is called Lesbian and gay which is a sexual identity specifically in an individual. Lesbian is aimed at the homosexual identity of women and gay is an identity that is attached to male homosexuals.

Sexual identity is closely related to sexual behavior and sexual orientation. Sexual identity is a social construction that is built with

⁵ 'Republika' <<http://www.republika.co.id/berita/nasional/daerah/16/02/12/o2fxoi280-pemkor-banda-aceh-diminta-bendung-lgbt>>.

⁶ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, 11th edn (Jakarta: PT Raja Grafindo Persada, 2009), pp. 13–14.

⁷ Johnny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif*, IV (Jakarta: Bayumedia, 2008), p. 310.

various forms of negotiation to reach certain agreements, both general and specific in nature. For example, the identities of men and women are not solely due to their biological sex. In the process of maturity, both of them are involved in a long social process, at least in a family consisting of fathers and mothers, who also determine the existence of each of them socially.⁸

LGBT identity is not necessarily taken for granted by an individual. This identity emerges through the stages of the development of homosexual identity. This is related to the process of someone becoming lesbian and gay. As a sexual orientation, homosexuality refers to a continuous pattern or disposition for sexual experience, affection or romantic attraction primarily or exclusively for people of the same sex. Homosexuality also refers to individual views about basic personal and social identity.

In terms of forms of sexual behavior and tendencies, LGBT people have many forms of behavior such as sexual fantasizing, holding hands, kissing, hugging and others. This form of behavior carried out by LGBT couples arises due to sexual urges and their liking for the same sex.

According to various studies, 2 to 13 percent of the human population has a homosexual tendency or have had same-sex relationships in his life. A 2006 study showed that 20 percent of the population anonymously reported having homosexual feelings. The prevalence of homosexuals in the society that has been studied is around 3-4 percent in men and 1-2 percent in women.⁹

LGBT groups are sociologically a manifestation of a person's attitude toward others of the same sex as sexual partners.¹⁰ Homosexuality itself is an attitude, action or behavior towards the same sex. LGBT behavior itself is an expression of interest in the form of affection, emotional relations

⁸ Aris Arif Mundayat, 'Konstruksi Identitas Homoseksual', *Jurnal Bening*, 2008, 9 (p. 9).

⁹ Akhmad Mukhlis dan Sadid Al-Muqim, *Pendekatan Psikologi Kontemporer* (Malang: UIN Maliki Press, 2013), pp. 221–22.

¹⁰ Soerjono Soekanto, *Sosiologi Suatu Pengantar* (Jakarta: PT Grafindo Persada, 1990), p. 381.

whether erotic or not, expressively or exclusively, aimed at people of the same sex. Homosexuality, although it is a form of sexual orientation that is different, but has the same alignment with heterosexual.¹¹

According to the Lesbian and Gay Association of Indonesia, *Swara Srikandi*, sexual orientation is one of the four components of sexuality which consists of emotional, romantic, sexual and affectionate feelings within a person of a certain gender. The three components of sexuality are biological sex, gender identity (the psychological meaning of men and women) and gender roles (cultural norms for feminine and masculine behavior). Sexual orientation is different from sexual behavior because it is related to feelings and self-concept, although in many cases sexual orientation can also be integrated with sexual behavior.¹²

LGBT has become a phenomenon that exists in the social life of the community. It is a social reality, which in the lens of phenomenology can only be explained from the perspective and experience of the actors themselves. Homosexuality is also the result of social construction or sexual education that is obtained from the environment.¹³ Rooted in the discourse, homosexuals transform, from a private sexual orientation to public discourse. The development of this discourse is a condition or condition for homosexuals who are led to self-resistance. Referring to Foucault's view which states that the various resistance raised by homosexuals is not a separate part of the reproduction of discourse and power. Individuals can rarely escape from power and are always entangled in a certain web of discourse.

On the other hand, the existence of LGBT is responded by the community as a movement that is subcultural to different cultures. These forms of response are reflected in people's attitudes and views that homosexual behavior is abnormal, in-natural and even considered

¹¹ Abdul Hatib Kadir, *Tangan Kuasa Dalam Kelamin: Telaah Homoseks, Pekerja Seks, Dan Seks Bebas Di Indonesia* (Yogyakarta: INSISTPress, 2007), p. 66.

¹² Demartoto, *Seks, Gender, dan Seksualitas Lesbian* (Solo: Universitas Negeri Surakarta, 2013), p. 6.

¹³ Abdul Hatib Kadir, p. 137.

a criminal act. As a result of rejecting attitudes and views, homosexual groups often experience violence both physical, verbal and psychological violence.¹⁴

The National Commission on Violence Against Women noted several cases of attacks experienced by LGBT groups who fought for the tolerance of the right to sexual orientation and gender identity. One of them was when ILGA (International Lesbian, Gay, Bisexual, Transgender and Intersex Association) held a conference in Surabaya March 26-28, 2010. The organizer of the conference was attacked by a group of people who called themselves: the East Java Islamic Community Forum, a combination of the Hizb Tahrir Indonesia, Islamic Defenders Front (FPI) of East Java and Formabes (United Madura Forum). This group searched the hotel rooms where the event was carried out, and even intimidated, destroyed and sealed the Gaya Nusantara office as the organizer of the activity.¹⁵

Similar to the above event, community resistance to public figures who have the same tendencies as LGBT groups also appear in the political sphere. This is demonstrated by the community's rejection of the nomination of Dede Oetomo and Yulianus Rottoblaus as Commissioners of the National Human Rights Commission in Indonesia, because these two people have different sexual preferences and sexual identities. The rejection of the two candidates was carried out through a petition addressed to Jimly As-Shiddiqy, a member of the House of Representatives Commission III selection team. The petition signed by 240 people contained a statement that: "Dede Oetomo (DO) is an activist of the LGBT legalization campaign (Lesbian, Gay, Bisexual, and Transexual). This violates the provisions of any religion recognized in Indonesia. He does not deserve a position in KOMNAS HAM because He will only fight for evil".¹⁶

¹⁴ Erick Stevan Manik, Ani Purwanti, and Dyah Wijaningsih, 'Pengaturan LGBT (Lesbian Gay Bisexual Dan Transgender) Dalam Perspektif Pancasila Di Indonesia', *Diponegoro Law Journal*, 5.2 (2016), 1–13 (p. 6).

¹⁵ Dede Oetomo, *Memberi Suara Pada Yang Bisu* (Yogyakarta: Galang Press, 2001), p. 18.

¹⁶ Buletin GAYa Nusantara, 'Rubrik: Pengalaman Sejati', *Buletin GAYa Nusantara*, February 2003.

Community response as above is a form of discourse strategy that shows the moral panic of a country. As Farid Muttaqin said in *Bhinneka* magazine, homophobic attitudes or excessive fear of homosexuals or LGBT people gain support from several verses in the Koran; These verses are a literal tool to emphasize the attitude of fear that triggers violence and discrimination against homosexuals in socio-cultural, political, legal and economic life.¹⁷ Whereas in Indonesian Law Number 39 of 1999 concerning Human Rights, especially in the eighth part of article 43 it is said that every citizen has the right to participate in government.

History of LGBT Development in Indonesia and Aceh

The history of the LGBT movement in Indonesia has been around for a long time. The LGBT community that is incorporated in Gay and Lesbian was established since the existence of the *Perlesin* (Indonesian Lesbian Association) in 1982. Then there was *Suara Srikandi*, who fought and collaborated with Indonesia's largest LGBT organization, *GAYaNusantara*, and *Lamda Indonesia* (LI) which was established on March 1, 1982. In the same year, precisely in August 1982, came the *G:: Gaya Hidup Ceria*, the first lesbian and gay magazine in Indonesia to fight for the emancipation of lesbians and gays.¹⁸ After that, the *Ardhanary* Institute was also established which was initiated by Saskia Wieringa and Rr. Agustine in 2007. This institution has the most complete resources and referrals related to lesbian issues in Indonesia.

In Yogyakarta, associations or organizations supporting the gay community have also sprung up; including PKBI (Indonesian Family Planning Association), VESTA, *PLU Satu Hati*, and *Q community*. In July 2008, in Yogyakarta, the Islamic Boarding School was established Monday-Thursday which organizes routine homosexual activities in Yogyakarta such as the Queer Film Festival and IDAHO (*International Days Against Homophobia*) and other activities supported by 27 communities.¹⁹

¹⁷ Farid Muttaqin, 'Majalah Bhinneka', *Majalah Bhinneka*, p. 29.

¹⁸ Dede Oetomo, p. 227.

¹⁹ Okdinata, 'Religiusitas Kaum Homoseks: Studi Kasus Tentang Dinamika Psikologis

In Aceh, the LGBT phenomenon existed before the Tsunami (2004), but its existence was still individual and unorganized. After the Tsunami, coupled with the number of foreign NGOs entering Aceh and carrying out the mission of the international LGBT movement, gradually the Aceh LGBT community began to form. This community can be observed in plain sight, where there are men with men or between women and women riding on motorbikes in an intimate style like lovers. The LGBT community continues to increase in population and is moving very systematically and massively. This phenomenon is characterized by the increasing courage of homosexuals to appear in public places, known as *ngeber*,²⁰ such as in city parks, squares, bridges, waterfronts, or bus terminals.²¹ Homosexuals have their way of showing people that they are of the same type. The symbols used are different and not necessarily the same for the symbols understood by the community, both in terms of how to behave, dress to how to communicate.

The first LGBT organization in Aceh was born in 2007. This organization calls itself *Violet Gray* (VG). Three years after that, *Putro Sejati Aceh* (PSA) was born, which is a special organization for transgenders and *Atapku* which is a lesbian-only organization that later changed its name to *Learning Together* (LeTo) Aceh. Apart from the PSA, in Bireuen there is also a special transgender organization called Tanoh Rencong Atjeh (TARENA). All of these LGBT organizations are moving rather privately.

The LGBT community in Aceh continues to increase from year to year and moves very systematically and massively. Their members come from all walks of life, some from government, civilians to teenagers who are still in school.²² These community activists actively carry out the

Keberadaan Gay Muslim di Yogyakarta' (unpublished Skripsi, Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2009), p. 4.

²⁰ Ngeber comes from the Javanese Nomina (noun) means curtain or screen on theatrical performances and so on.

²¹ Tom Boellstorff, 'Gay Dan Lesbian Indonesia Serta Gagasan Nasionalisme', *Antropologi Indonesia*, 2014, pp. 4–5 <<https://doi.org/10.7454/ai.v30i1.3550>>.

²² Iqbal Kamalludin and others, 'Politik Hukum Dalam Kebijakan Hukum Pidana LGBT', *Jurnal Cita Hukum*, 6.2 (2018), 317-342–342 (p. 319) <<https://doi.org/10.15408/jch.v6i2.7805>>.

capacity building through regular meetings, training, and discussions on human rights, sexuality, and protection of group rights. They try to lead the opinion that their deviant behavior is a natural thing, not against nature and have the same right to live in society as other normal humans. Their target, of course, is for their existence to be seen as legal and legal.

Violet Gray collaborates very actively with several organizations and NGOs in Aceh. Apart from that, the community has also established cooperation with one of the Aceh Government agencies. In 2011, activist Violet Gray established a model school called Zero-V Management (ZV). It was through this school that LGBT activists recruited young Acehnese to be promoted to a higher level.²³ They are active in various national and international events and carry the name of Aceh as if Aceh legalized them.

To realize their dreams, LGBT people need several prerequisites: First, their numbers must be statistically significant, so that it is appropriate to change public assumptions. Secondly, their existence has fulfilled the population requirements, so it is worth mentioning as a community. Third, their behavior has been accepted normatively according to mental health requirements from WHO.²⁴ These three things have been successfully achieved by them, including the support of foreign parties through funding and assistance for certain programs. In 2012-2013, a Dutch NGO named Hivos disbursed funds of EUR 32,487,²⁵ or around Rp. 499,227,792. for LGBT in four cities, including Banda Aceh.

At the national level, in 2016 the United Nations Development Program (UNDP) budgeted US \$ 8 million (around Rp. 108 billion) to support the LGBT community in four countries, namely Indonesia, China, the Philippines, and Thailand.²⁶ there are government officials,

²³ www.tribunnews.com <<http://www.tribunnews.com/regional/2016/02/13/komunitas-lgbt-di-aceh-hadir-sejak-2007-berkedok-kegiatan-pendampingan-korban-dan-ham>>.

²⁴ Agustin Hanafi, 'Mewaspadai Aliran LGBT di Aceh', 2016 <<http://acep.tribunnews.com/2016/02/11/mewaspadai-aliran-lgbt-di-aceh>>.

²⁵ HIVOS ROSEA, 'CSR Mapping and LGBT Organization Assistance in Indonesia'.

²⁶ Eko Supriyadi, *Republika*, 'UNDP Keluarkan Rp 108 Miliar Untuk LGBT Indonesia'

civilians, and high school students. Customers who come also come from all classes of society, including children who are still in high school. This is a concern for the people of Aceh.

In fact, before the outbreak of the LGBT phenomenon in Bumi Tanah Rencong, the Banda Aceh City Government, through the Satpol PP and WH, routinely held raids on beauty salons whose employees were men but behaved like women. This is done so that deviant behavior and habits do not become a culture. In each raid, officers always called for workers to wear clothes that match their sex. Unfortunately, this Satpol PP and WH policy received protests and opposition from NGO activists who viewed the policy as violating human rights.²⁷

Legal Provisions regarding LGBT in Islam, the Criminal Code and Qonun Jinayat

In Islam, the term LGBT is known by two terms, namely *liwâth* (gay) and *musâhaqah* (lesbian). While the terms bisexual and transgender have not been discussed specifically in Islam. Nevertheless, this deviant tendency can be classified in a new term which is the development of the two terms above (*liwâth* and *musâhaqah*).

Liwâth (gay) is an act carried out by a man by inserting his *dzakar* (penis) into the rectum of another man. *Liwâth* is a word (naming) which is attributed to the people of Loth 'Alaihis Salam, because the people of the Prophet Loth 'Alaihis Salam were the first people to do this action (*Hukmu al-liwâth wa al-Sihaaq*) as mentioned in the Al-Qur'an Surah Al-Araf verses 80-84:

أَتَأْتُونَ الْفَاحِشَةَ مَا سَبَقَكُمْ بِهَا مِنْ أَحَدٍ مِنَ الْعَالَمِينَ ﴿٨٠﴾ إِنَّكُمْ لَتَأْتُونَ
الرِّجَالَ شَهْوَةً مِّنْ دُونِ النِّسَاءِ ۗ بَلْ أَنتُمْ قَوْمٌ مُّسْرِفُونَ ﴿٨١﴾ وَمَا كَانَ
جَوَابَ قَوْمِهِ ۚ إِلَّا أَنْ قَالُوا أَخْرِجُوهُمْ مِّنْ قَرْيَتِكُمْ ۗ إِنَّهُمْ أَنَاسٌ يُّنظَهُرُونَ

<<http://nasional.republika.co.id/berita/nasional/umum/16/02/12/o2fsmh282-undp-keluarkan-rp-108-miliar-untuk-lgbt-indonesia>> [accessed 12 February 2016].

²⁷ Chief Investigator at Satpol PP and WH Banda Aceh, 2016.

﴿٨٢﴾ فَأَنجَيْنَاهُ وَأَهْلَهُ إِلَّا أُمَّرَأَتَهُ ۚ كَانَتْ مِنَ الْغَابِرِينَ ﴿٨٣﴾ وَأَمْطَرْنَا عَلَيْهِمْ
مَطَرًا فَأَنْظَرُوا كَيْفَ كَانَتْ عَاقِبَةُ الْمُجْرِمِينَ ﴿٨٤﴾

Surely you come to men to give up your passions (to them), not to women, instead you are a people who transgress the limits. The answer of his people was nothing but saying: "Drive them (Lut and his followers) out of your city; surely they are the ones who pretend to purify themselves." Then We saved him and his followers except for his wife; He includes those who are left behind (destroyed). And We send them a rain (stone); So pay attention to how the end of the sinners.

While musâhaqah (lesbian) is a passionate love relationship between women with the image of two women rubbing their limbs (*farji*) between one another until both of them feel the delicacy in the relationship.²⁸

In contrast to man-made laws, the application of punishment in Islam aims to make humans human and maintain the community. The Islamic Shari'ah has set lofty goals attached to its laws. These noble goals include; the maintenance of offspring (*al-muhâfazhatu 'ala an-nasl*), the maintenance of reason (*al-muhâfazhatu' ala al-'aql*), maintenance of glory (*al-muhâfazhatu' ala al-karamah*), maintenance of the soul (*al-muhâfazhatu 'ala al-nafs*), care for property (*al-muhâfazhatu 'ala al-mâl*), maintenance of religion (*al-muhâfazhatu' ala al-din*), maintenance of security / security (*al-muhâfazhatu 'ala al-amn*), maintenance of state (*al-muhâfazhatu' ala al-daulah*).²⁹

To preserve human offspring and their families, Islam has forbidden adultery, gays, lesbians and other sexual deviations and sanctions for the perpetrators. Although the jurists agree that LGBT people must be punished, they have different views about the form of punishment that must be imposed. Their differences of opinion can be understood from the following explanation:

²⁸ Sayyid Sabiq, *Fiqhus Sunnah (Terj)*, 1st edn (Kairo: Dar al Fath Lil I'lam Al 'arobi, 2000), iv, p. 51.

²⁹ Abdullah, Muhammad Husain, *Dirasat Fi al Fikr al Islamiy* (Dar al Bayariq, 1990), p. 100.

1. Sentenced to Death.

According to Al-Imam Asy-Syaukani Rahimahullah: the person who does the *liwâth* with his *dzakar* (penis) is to be killed, even if the person who is not married is the same, either *fa'il* (the perpetrator) or *maf'ul bih* (the partner). They based this opinion with a *hadith* (Prophet Sayings) that was referred to Abdul Aziz bin Muhammad, from 'Amr ibnu Abi' Amr, from Ikrimah, from Mrs. Abbas, that the Messenger of Allah had said:³⁰

مَنْ وَجَدْتُمُوهُ يَعْمَلُ عَمَلِ قَوْمِ لُوطٍ فَأَقْتُلُوا الْفَاعِلَ وَالْمَفْعُولَ بِهِ
 Whoever among you find doing the deeds of the Luth (*liwâth*), then
 kill the *fa'il* (perpetrators) and *maf'ul bih* (partners)

2. Stoning;

This is as narrated by Al-Baihaqy from Ali that he once stoned a person who commits evil. Imam Shafi'i said: "Based on this proposition, we use stoning to punish those who commit *liwâth*, be they *muhsban* (married) or other than *muhsban* (unmarried). This is in line with Al-Baghawi, then Abu Dawud "from Sa'id bin Jubair and Mujahid from Ibn Abbas saying: those who are not married when they are found doing *liwâth* must be stoned.³¹

3. Being punished is the same as the punishment of adultery.

This opinion was conveyed by Sa'id bin Musayyab, Atha 'bin Abi Rabbah, Hasan, Qatadah, Nakha'i, Tsauri, Auza'i, Imam Yahya and Imam Shafi'i (in other opinions), which they say that the punishment for those who commit *liwâth* is the penalty for adultery. If the perpetrators of *liwâth* are *muhsban* then *stoned*, and if not *muhsan* whipped and exiled.³²

4. *Tâzir* (Ruler's decision);

Abu Hanifah considers homosexual behavior is not included in the

³⁰ Al-Imam asy-Syaukani, *Ad-Darariy Al-Mudhiyah* (Beirut: Darul Kutub Al-Imiyah, tt), pp. 371–72.

³¹ Al-Imam asy-Syaukani, p. 371.

³² Al-Imam asy-Syaukani, p. 371.

definition of adultery, because adultery is only done on the vagina (*qubul*), not on the rectum (*sodomy*) as practiced by homosexuals. Therefore, according to him, the punishment for those who commit *liwâth* is *ta'zir*, not to be whipped and not to be stoned. Likewise, with lesbian offenders, the punishment for lesbian offenders is *ta'zir*. Al-Imam Malik Rahimahullah believes that women who do *sihaq* (*lesbian*), the punishment is flogged a hundred times. Jumhur ulama believes that women who do *sihaq* have no *hadd* (punishment) for her except *ta'zir*. This is because the relationship is not included in the category of *dukhul* (*entering vagina*). So that lesbians will not be punished as not in the presence of men who have sex with women without *dukhul* (*enter*) on *farji* (*vagina*). This is a *râjih* (true opinion).³³

Turning to the law in Indonesia, actually, a bill to criminalize homosexual attitudes, living together outside the bonds of marriage (cohabiting), adultery and magical practices, was made in 2003. But unfortunately the bill failed to be ratified and in the following years not has been submitted again. Therefore, until now, national law in Indonesia has not regulated or prohibited LGBT behavior, except if it's done with children or minors.

Both the Criminal Code and the Criminal Code Bill do not consider homosexual acts a criminal offense; as long as it does not violate other, more specific laws; such as child protection law, decency, pornography, prostitution, and rape crime. In other words, homosexual acts are not considered criminal acts, as long as they are only carried out by adults (do not involve minors or adolescents), privately (confidential / closed, not committed in the open / public place, not recorded pornography and disseminated), non-commercial (not prostitution), and on the basis of like and like (not coercion or rape).

In Article 292 of the Draft Criminal Code Bill, it is stated that sexual intercourse is prohibited only between adults and minors or persons not yet 18 years old. The punishment for perpetrators of same-

³³ Sayyid Sabiq, iv, p. 51.

sex intercourse with minors is to be imprisoned for a maximum of 5 years.³⁴ Article 492 of the Draft Penal Code prohibits sexual intercourse with a person who has not reached the age of 18 years with the maximum sentence of imprisonment of 1 year and a maximum of 7 years.

The Criminal Code and the Penal Code Bill also do not prohibit bisexual and transsexual / transgender people.³⁵ Even in the Population Law, Law No. 23/2006 on Population Administration, there is an opportunity for the LGBT community, because in this Act residents can record "Important Events", not only important events that are commonly recorded such as births, marriages or deaths, but also "Other Significant Events". In the explanation of Article 53 paragraph (2) of this Law, what is meant by "Other Significant Events" are events determined by the District Court to be recorded at the Implementing Agency, including changes in sex. Prohibition of homosexual practices only emerged in 2008, when the government passed Law No. 44/2008 on Pornography and Porno action, which one of the verses of the Act mentions the prohibition of homosexual practices.

Based on the explanation above, it is clear that between Islamic law and the Criminal Code there are differences in principles; Whereas the Criminal Code considers homosexual violations is only limited to sexual relations, Islamic law does not limit only to sexual acts but also prohibits the inclusion of the opposite sex. Apart from that, according to the Criminal Code, similar relationship behavior is only prohibited if it is carried out with a person who is not yet mature whereas in Islam a similar relationship is *haram* (unlawful) both done with an immature person and a fellow adult. Besides, the purpose of prohibiting similar relationships in the Criminal Code is to protect young children from homosexual behavior while in Islam the aim

³⁴ Yuliana Surya Galih, 'Suatu Telaah Lesbian, Gay, Biseksual, Transgender (LGBT) Dalam Perspektif Hukum Positif', *Jurnal Ilmiah Galuh Justisi*, 4.1 (2016), 92–106 (p. 101) <<https://doi.org/10.25157/jigi.v4i1.413>>.

³⁵ Neng Djubaedah, 'Perzinaan Dalam Undang-Undang Bertulis Di Indonesia Dan Malaysia Menurut Hukum Islam: Kajian Perbandingan Di Indonesia Dan Malaysia' (Fakultas Undang-Undang, Universitas Kebangsaan Malaysia, 2013).

is to look after offspring, glorify humans and teach humans to be grateful for the favor of Allah.³⁶

Turning to the Province of Aceh, in this region, there are legal provisions that prohibit *jarîmah*³⁷ *liwâth* (homosexuals), *musâhaqah* (lesbians) and *ikhtilâth* (touching between men and women who are not *mahram*), namely Qanun Number 6 of 2014 concerning Law Jinayat and Qanun Number 7 of 2013 concerning Qanun of Jinayat Events. However, in reality the two Qanuns cannot yet be used to ensnare LGBT perpetrators because they do not provide clear formulations of these criminal acts including provisions to fulfill evidentiary procedures.

The same is true with bi-sexual and transgender cases. Even these two deviant sexual behaviors have not been touched at all by the Qanun Jinayat rule. The main obstacle in this case is that bi-sexual proof is more difficult than homosexuals and lesbians. Bi-sexual offenders are very difficult to recognize, as are their actions, because they often hide behind marital status. Transgender also needs clear and strict rules because this can lead to the legalization of homosexuals or lesbians.

LGBT Cases in Aceh and their Operational Modes

To get an idea of how widespread the LGBT phenomenon is in Banda Aceh City, the author researched the Banda Aceh PP polic office and managed to obtain the following data:

1. The Case of August 16, 2015

This case involved a Waria (Shemale) prostitute with initial H and a customer with initial JA. Both were arrested by the PP Pol around 03.00 WIB while doing oral sex in an alley in Gampong L, District A, Banda Aceh City. Evidence seized in the form of: KTP

³⁶ Abd. Aziz Ramadhani, *Homoseksual dalam Perspektif Hukum Pidana dan Hukum Islam: Suatu Studi Komparatif Normatif*, Skripsi Fakultas Hukum, Universitas Hasanuddin Makassar, 2012.

³⁷ Jarîmah is doing prohibited acts and / or not carrying out acts ordered by Islamic sharia, which in Qanun Jinayat are threatened with penalty of *Hudud*, *Qishas*, *Diyat* and/or *Tâ'zir*.

on behalf of the initials H, 1 unit of Nokia cellphone, 1 Unit of Yamaha Jupiter MX Motorcycle, 3 condom sachets, A brown bag (all belonging to H), and a Driver Licence on behalf of JA, Yamaha Mio motorcycle Soul GT (owned by JA). Their actions violate Article 63 Paragraph (1) Qanun number 6 of 2014 concerning Jinayat Jo Article 11 paragraph (1) juncto of Regional Regulation number 5 of 2000 concerning the Implementation of Islamic Sharia. Perpetrators who are caught are only given a warning and asked to make a Statement that they will not repeat their actions. Then both are released by getting further coaching.³⁸

2. The Case of September, 30, 2015

To prevent the spread of public diseases, especially prostitution, Banda Aceh City Police routinely conduct raids in certain places which are suspected to be the bases of prostitutes and transvestites. In an operation that was held on the evening of Wednesday 30 September 2015 at 03.30 on PB Street in Banda Aceh City, officers succeeded in catching MRS on the edge of the Aceh river along with several other transvestite friends who were looking for customers to be offered sex services

In the official report, it is known that MRS has repeatedly been involved in the same case and violated Article 19 paragraph 1 Jo Article 11 Paragraph 3 of Regional Regulation number 5 of 2000 concerning the Implementation of Islamic Sharia. He also admitted that on December 20, 2014, a Satpol PP officer had been caught red-handed because he was dressed as a woman and was roaming the streets around 04.00 WIB.³⁹ Perpetrators are not sentenced, but only given coaching and asked to make a Letter of Statement that they will not repeat their actions anymore.⁴⁰

³⁸ 'Staff's Case Study Document Lr. In Front of Church M Jalan PB Kecamatan K Kota Banda Aceh', 2015.

³⁹ 'Minutes of the Brief Examination by the Pamong Praja and Wilayatul Hisbah Police Unit in Banda Aceh City on Behalf of MRS'.

⁴⁰ 'Minutes of the Brief Examination by the Pamong Praja and Wilayatul Hisbah Police Unit in Banda Aceh City on Behalf of MRS'.

3. The Case of October 11, 2015

Similar to the incident dated 30 September 2015, routine raids carried out by the PP Polic Unit in several places in Banda Aceh City succeeded in catching MD along with R who were waiting for prospective customers who passed by on the banks of Kali Aceh.⁴¹ Both perpetrators pleaded guilty to offering prostitution services and violated Bylaw number 5 of 2000 concerning the Implementation of Islamic Sharia Article 19 paragraph 1 Jo Article 11 Paragraph 3. As with the previous cases, MD and R were not detained as criminal perpetrators in general, but only given direction and guidance and asked to make a Statement that they will not repeat their actions.

4. The Case of October 24, 2015

Routine raids in the context of eradicating the practice of prostitution were again held by the PP Police Unit in several places in Banda Aceh City. During the operation on October 24, 2015 at Simpang Surabaya at 02.05 WIB in the early hours of the morning, officers managed to catch the transvestite prostitutes initiates MD and R who were waiting for prospective customers on the edge of the Aceh River.

In another location, on the same night, officers also managed to arrest DK and RK alias Y on the Panglima Polem street in Banda Aceh City. When he was arrested, he and his friends were waiting for customers, most of whom were city transportation drivers, fishermen and pedicab drivers. In the investigation report, DK admitted that he had been arrested twice by Satpol PP.⁴² As is the case with previous transvestite prostitutes, MD, R, DK, and RK were not processed at the court level. They were only briefed and asked not to repeat their actions.⁴³

⁴¹ 'Minutes of the Brief Examination by the Pamong Praja and Wilayatul Hisbah Police Unit in Banda Aceh City on Behalf of MRS'.

⁴² 'Minutes of the Brief Examination by the Pamong Praja and Wilayatul Hisbah Police Unit in Banda Aceh City on Behalf of RK'.

⁴³ 'Minutes of the Brief Examination by the Pamong Praja and Wilayatul Hisbah Police Unit in Banda Aceh City on Behalf of R'.

The cases as explained above are only a small part of a large number of LGBT cases in Banda Aceh City. From the data obtained in the field, the only members of the LGBT community that were caught were those who openly peddled themselves on the streets and offered same-sex sex services by accepting payment according to the agreement. For homosexuals who do not contain commercial elements (likes and likes) members of the community usually communicate via mobile phones and perform these actions in hotels, boarding rooms, in cars, or in certain places that are not easily detected by the authorities. This is what causes the number of cases caught in the act of *musâhaqah* (lesbianism) and *liwâth* (homosexual) is very minimal, because they are very clever in covering up their actions, so it is difficult to trace.⁴⁴

Obstacles in proving LGBT offenses in the Jinayat Qanun

From the initial research at the Satpol PP and WH office in Aceh province, there were dozens of transvestite prostitution cases whose perpetrators were released because they could not be investigated. The main obstacle is the limitation of *liwâth* (homosexual) and *musâhaqah* (lesbian) behavior in the Qanun Jinayat which is very limited and multi-interpretable.⁴⁵ Because of these unclear boundaries, investigators found it difficult to ensnare the culprit.

This is shown in many *liwâth* cases where the perpetrator does it not by sodomy (inserting the penis into the rectum of a partner) but by oral sex (inserting the penis into the partner's mouth).⁴⁶ Such acts certainly do not meet the provisions contained in the Qanun, so investigators cannot ensnare the perpetrators with accusations of *liwâth*⁴⁷

Another problem that also makes it difficult for investigators to ensnare the perpetrators of *Jarimah Liwâth* and *Musâhaqah* is the difficulty of obtaining supporting evidence. Unlike the case of *khalwat*, *ikhtilâth* or

⁴⁴ Mr. Muslim, S.Ag, Civil Servant Investigator (PPNS) Satpol PP WH Aceh.

⁴⁵ investigators and data, investigators and data obtained from Satpol PP and WH Banda Aceh, 2016.

⁴⁶ investigators and data.

⁴⁷ Marzuki, M.H, Head of Investigation at Satpol PP and WH Banda Aceh, 2016.

adultery which can be seen in plain sight, in the *liwâth* and *musâhaqah* cases, the evidence obtained in the field is generally minimal coupled with the difficulty of obtaining witness testimony because the witness is also domiciled as the perpetrator,

These constraints indicate that the Qanun Jinayat must be immediately revised. If not, deviant sex offenders will remain free to act forever because they know that no legal sanctions whatsoever can be imposed on them. Apart from revising the sound of existing provisions, Qanun Jinayat also needs to contain rules that threaten certain parties who participate in facilitating or assisting *Liwâth* / lesbians, both individually and institutionally. This is important because the LGBT phenomenon is no longer just a case of sexual perversion but has begun to enter the commercial world which is marked by the emergence of sites where LGBT people meet between vendors and their customers.

Conclusion

In Aceh, the LGBT phenomenon is no longer merely a form of deviation from human behavior from the normal order of nature, but it has headed towards commercialization. This phenomenon must be watched and anticipated as early as possible because it endangers the social fabric of human society, especially young people and can be a serious threat to family institutions. For this reason, the Aceh Provincial Government must limit the space for LGBT people and monitor their activities while fortifying the next generation of the nation with a comprehensive understanding of religious knowledge. Besides that, the articles governing LGBT behavior in the Jinayat Qanun and the Jinayat Program Qanun must be immediately revised and developed so that the perpetrators, including their facilitators, can be charged with law.

Bibliography

- Abdullah, Muhammad Husain. *Dirasat Fi al Fikr al-Islamiy*. Ttp.: Dar al Bayariq, 1990.
- Asy-Syaukani, Al-Imam. *al-Darariy a-Mudhhiyah*. Beirut: Darul Kutub Al-Imiyah, tt.

- Boellstorff, Tom, 'Gay Dan Lesbian Indonesia Serta Gagasan Nasionalisme', *Antropologi Indonesia*, 2014 <<https://doi.org/10.7454/ai.v30i1.3550>>
- Buletin GAYa Nusantara, 'Rubrik: Pengalaman Sejati', *Buletin GAYa Nusantara*, February 2003
- Chief Investigator at Satpol PP and WH Banda Aceh, 2016
- Demartoto, *Seks, Gender, dan Seksualitas Lesbian*. Solo: Universitas Negeri Surakarta, 2013.
- Galih, Yuliana Surya, 'Suatu Telaah Lesbian, Gay, Biseksual, Transgender (Lgbt) Dalam Perspektif Hukum Positif', *Jurnal Ilmiah Galuh Justisi*, 4.1 (2016), 92–106 <<https://doi.org/10.25157/jigj.v4i1.413>>
- Hanafi, Agustin. 'Mewaspada Aliran LGBT Di Aceh', 2016 <<http://acep.tribunnews.com/2016/02/11/mewaspada-aliran-lgbt-di-aceh>>
- HIVOS ROSEA, 'CSR Mapping and LGBT Organization Assistance in Indonesia'
- Investigators and data, investigators and data obtained from Satpol PP and WH Banda Aceh, 2016.
- Ibrahim, Johnny. *Teori dan Metodologi Penelitian Hukum Normatif*, IV. Jakarta: Bayumedia, 2008.
- Kamalludin, Iqbal, Hirda Rahma, Aldila Arumita Sari, and Pujiyono Pujiyono, 'Politik Hukum Dalam Kebijakan Hukum Pidana LGBT', *Jurnal Cita Hukum*, 6.2 (2018), 317-342–342 <<https://doi.org/10.15408/jch.v6i2.7805>>
- Kadir, Abdul Hatib. *Tangan Kuasa Dalam Kelamin: Telaah Homoseks, Pekerja Seks, dan Seks Bebas di Indonesia*. Yogyakarta: INSISTPress, 2007.
- Kepustakaan Nasional, *Kamus Besar Bahasa Indonesia: Edisi Baru*. Jakarta Barat: Pustaka Phoenix, 2007.
- Manik, Erick Stevan, Ani Purwanti, and Dyah Wijaningsih, 'Pengaturan LGBT (Lesbian Gay Bisexual dan Transgender) dalam Perspektif Pancasila di Indonesia', *Diponegoro Law Journal*, 5.2 (2016), 1–13.
- Marzuki, M.H, Head of Investigation at Satpol PP and WH Banda Aceh, 2016

- 'Minutes of the Brief Examination by the Pamong Praja and Wilayatul Hisbah Police Unit in Banda Aceh City on Behalf of MRS'
Mr. Muslim, S.Ag, Civil Servant Investigator (PPNS) Satpol PP WH Aceh Mukhlis, Akhmad, dan Sadid Al-Muqim, *Pendekatan Psikologi Kontemporer*. Malang: UIN Maliki Press, 2013.
- Mundayat, Aris Arif. 'Konstruksi Identitas Homoseksual', *Jurnal Bening*, 2008, 9
- Muttaqin, Farid. 'Majalah Bhinneka', *Majalah Bhinneka*
- Neng Djubaedah, 'Perzinaan Dalam Undang-Undang Bertulis di Indonesia dan Malaysia Menurut Hukum Islam: Kajian Perbandingan di Indonesia Dan Malaysia'. Fakultas Undang-Undang, Universitas Kebangsaan Malaysia, 2013.
- Oetomo, Dede. *Memberi Suara Pada Yang Bisu*. Yogyakarta: Galang Press, 2001.
- Okdinata, 'Religiusitas Kaum Homoseks: Studi Kasus Tentang Dinamika Psikologis Keberadaan Gay Muslim di Yogyakarta'. unpublished Skripsi, Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2009.
- Ramadhan, Abd. Aziz. *Homoseksual dalam Perspektif Hukum Pidana dan Hukum Islam: Suatu Studi Komparatif Normatif*. Skripsi Fakultas Hukum, Universitas Hasanuddin Makassar, 2012.
- 'Republika' <<http://www.republika.co.id/berita/nasional/daerah/16/02/12/o2fxoi280-pemkot-banda-aceh-diminta-bendung-lgbt>>
- Sabiq, Sayyid. *Fiqhus Sunnah (Terj)*, 1st edn. Kairo: Dar al Fath Lil I'lam Al-'Arobi, 2000.
- Soekanto, Soerjono. *Sosiologi Suatu Pengantar*. Jakarta: PT Grafindo Persada, 1990.
- _____, dan Sri Mamudji. *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, 11th edn. Jakarta: PT Raja Grafindo Persada, 2009.
- Supriyadi, Eko. Republika, 'UNDP Keluarkan Rp 108 Miliar Untuk LGBT Indonesia' <<http://nasional.republika.co.id/berita/nasional/umum/16/02/12/o2fsmh282-undp-keluarkan-rp-108-miliar-untuk-lgbt-indonesia>> [accessed 12 February 2016]

'Staff's Case Study Document Lr. In Front of Church M Jalan PB
Kecamatan K Kota Banda Aceh', 2015

www.tribunnews.com <<http://www.tribunnews.com/regional/2016/02/13/komunitas-lgbt-di-aceh-hadir-sejak-2007-berkedok-kegiatan-pondampingan-korban-dan-ham>>