

THE APPLICATION OF POSITIVE LAW AND ISLAMIC LAW TO HOMOSEXUAL SEXUAL BEHAVIOR

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ABSTRACT

The objectives of this study are 1) to understand the position of the united assembly on *ijab kabul* for marriage via video call; 2) to assess the law of marriage via video call based on the marriage law and Islamic law in Indonesia; 3) to identify the obstacles that arise in the implementation of marriage via video call. To overcome these problems, this research uses the library research method, which means that data is obtained from literature such as books, writings, and sources that are substantial to the issue of marriage through video calls. These sources come from various works that discuss this issue from an Islamic and civil law perspective, among others. The results of the study show that marriage through video calls, within the framework of Islamic marriage law, must comply with the provisions and conditions that apply to the validity of marriage. As long as there is no official decision from a legal institution clarifying how this kind of marriage will be handled in a religious court, then the validity of the marriage depends on whether the *ijab kabul* took place without doubt and fulfilled the applicable terms and conditions. If it fulfills the conditions and pillars of marriage and does not violate the Compilation of Islamic Law, then the marriage is considered valid. This is corroborated by the provisions in articles 27 to 29 of the Compilation of Islamic Law, which emphasize that *Ijab Kabul* must occur without a break in time, be performed by the marriage guardian concerned, and be pronounced by the marriage partner.

Keywords: same sex, gay, positive law, islamic law.

INTRODUCTION

The Islamic legal system of thought is rooted in the Qur'an and Hadith as both contain legal regulations that govern life. Islamic law covers various aspects, and although some regulations are detailed, most are general with points that need to be interpreted more deeply. One of the aspects regulated by Islamic law is the relationship between men and women through marriage. Religion permits the meeting of a man and a woman, and directs this meeting towards the formation of a legal marriage. This aims to turn initial concerns

into harmony, as explained in the Qur'an Surah Ar-Rum (30): 21. The Qur'ān and as-Sunnah contain noble and ideal values, but when these values interact with various human cultures, sometimes deviations occur, both intentional and unintentional. This problematic understanding can arise due to differences in intelligence levels, the influence of individual social, cultural and historical backgrounds. In addition, sacred texts themselves have both literal and symbolic meanings. The Arabic language used in sacred texts is very rich in meaning, so a single word can have a variety of different interpretations depending on the context.

Sexuality introduces three important concepts, namely sexual identity, sexual orientation, and sexual behavior (Cviklová, 2012). Misunderstanding these three concepts can lead to wrong conclusions. Sexual orientation is an element that needs to be emphasized, because sexual orientation is something that comes from nature and God's destiny. Human sexual orientation is a fitrah that cannot be changed, and individuals have no choice in terms of their sexual orientation. Being heterosexual, gay, or having any other sexual orientation is not the result of individual choice or social construction. However, it is possible that one's sexual orientation tendencies may become more apparent or manifested after being influenced by certain environments. For example, the influence of the pesantren environment may affect the manifestation of one's sexual orientation, as reflected in some local terms such as mairil or sempet. In following the prohibition of same-sex marriage, which is often referred to as homosexual or gay, it is necessary to understand the concept. Homosexuality refers to the tendency to be attracted to individuals of the same sex (Jahangir & Abdullatif, 2016). In other words, a person who is homosexual has a romantic or sexual attraction to individuals of the same gender. This is in contrast to heterosexuality, which refers to attraction to individuals of the opposite sex. In same-sex marriage, the term is more often used to refer to romantic or sexual relationships between male individuals of the same sex.

According to Indonesian law, same-sex (homosexual/gay) marriage is not permitted. This refers to Article 1 of Law No. 1 of 1974 on marriage, which explains that marriage is a physical and mental bond between a man and a woman as husband and wife, with the aim of forming a happy and lasting family (household) based on the Almighty God. However, there are differences in the formulation of the term marriage in the Compilation of Islamic Law (KHI). In Chapter I articles 2 and 3 KHI states that marriage according to Islamic law is marriage, which is a very strong contract to obey the commands of Allah and is an act of worship. The purpose of marriage in this case is to create a household life that is *sakinah*, *mawaddah*, and *rohmah*.

The Compilation of Islamic Law (KHI) expressly does not regulate same-sex marriage (homosexual/gay). The formulation of marriage in KHI does not pay attention to the subject of the contract, and focuses on the goal of building a household that is *sakinah*, *mawaddah* and *rahmah*. Therefore, KHI does not provide opportunities or legalization for same-sex marriage, because in another article KHI states that the principle

of marriage is between individuals of the opposite sex (heterosexual). Islamic law opposes same-sex marriage (male to male/female to female) based on the teachings of the Qur'an and Prophetic Hadith (Bećirović-Alić, 2023). The Qur'an explicitly denounces homosexual acts in several verses, as mentioned in one of the verses that talks about Lot (the Prophet) and his people. The verse highlights the abominable acts they committed, including same-sex relationships which are forbidden and scorned. The Qur'an also emphasizes that sex is only allowed within the bond of marriage between a man and a woman. Many individuals who have a homosexual sexual orientation claim that they were born with the tendency and that they have no choice in the matter. Although the debate on this assumption still continues in the medical world, the Qur'an makes it clear that this is not given as a justification for homosexual practices.

Early scholars' views on homosexuality generally condemned the practice and gave three main opinions on the punishment for homosexuality. The first opinion states that homosexuality should be punished by death, indicating a very harsh view of the act. The second opinion proposes that the punishment for homosexuality should follow that of adultery, with the punishment corresponding to the offender's marital status. If the offender is unmarried, he or she should be punished with hadd, while if he or she is married, the punishment should be stoning. The third opinion tries to provide other sanctions or punishments without specifying the details of the punishment. These views reflect the traditional viewpoints and norms of Islamic law towards homosexuality. It should be noted that in modern societies and laws, the approach to this issue may differ and some countries do not impose very harsh punishments on homosexuality as suggested by some scholarly views. The issue remains a subject of debate and controversy in society and law, with most countries increasingly recognizing LGBT rights.

Sexual behavior that is considered deviant is a real phenomenon in Indonesia, and there is potential for such behavior to lead to sexual offenses. This is related to some groups who find it difficult to fulfill their biological needs in ways that are considered socially appropriate. As a result of this phenomenon, we are currently witnessing an increase in sexual crimes, including acts of sexual immorality committed by adults against members of the same sex or against minors. One form of this crime is pedophilia, which refers to the sexual abuse of minors by both same-sex and different-sex individuals. Indonesian law regulates various types of crimes of decency, primarily in Chapter XIV of the Criminal Code, which includes Articles 281 to 303 of the Criminal Code. One of the regulations relating to deviant sexual behavior is Article 292 of the Criminal Code which relates to same-sex sexual abuse of minors (pedophilia). In this regard, the author feels the need to further explore issues surrounding sexuality, both from the perspective of positive law (legislation) and the perspective of Islamic law. This study will help to understand more deeply the issue of sexuality that is increasingly sticking out in society in order to take appropriate action to overcome this problem.

METHODS

This study is a type of literature study, also known as library research. This type of study is based on relevant data and literature related to the subject matter being researched. Almost all types of studies require library studies, although there are differences in the function, purpose and role of library studies in each type of study. In a desk study, the search for literature sources goes beyond preparing a study outline, detailing a methodology or deepening a theoretical study. A desk study can also include collecting study data without conducting a field study.

RESULTS AND DISCUSSION

1. Assessment of Islamic Law Against Gay Sexual Behavior

Homosexual practice is stated as a forbidden act in Islamic teachings because it is considered a form of adultery. There are various views from Islamic law scholars regarding the sanctions or penalties that should be imposed on homosexual offenders, as expressed by Zainuddin bin Abdil 'Aziz Al-Malibaary, quoted by Mahjudin. There are differences of opinion among Islamic jurists regarding sanctions for homosexual practices. Some scholars of Islamic law decided that homosexual offenders should be subject to sanctions equivalent to the punishment for adultery. If the offender has been married before, then he must be stoned (put to death). If the offender has never been married, he must be flogged one hundred times. This opinion reflects the two opinions expressed by Imam Shafi'i (Al-Qaulul Qadim and Al-Qaulul Jadid). In addition, this opinion also includes the punishment for men and women, who have been married or not. On the other hand, some other scholars are of the opinion that homosexual offenders, even if they have never been married, should be stoned. This opinion is in line with the views of Imam Malik and Imam Ahmad bin Hanbal. Imam Shafi'i, in a different opinion, states that homosexual offenders and people involved in homosexual practices, including lesbians, should be put to death in accordance with the hadith that states: Whoever finds someone who behaves homosexually like the people of Lot, then kill the perpetrator and his partner. This hadith was narrated by Abu Daud, At Turmudzy, Ibn Majjah, and Al Baihaqy.

According to al-Mundziri, Caliphs Abu Bakr and Ali had sentenced homosexual couples to death. The second opinion, held by al-Auza'i, Abu Yusuf and others, is that the punishment for homosexuality is comparable to that for adultery. This means that unmarried offenders will be punished by flogging and exile, while married offenders will be punished by stoning. This view is based on the Prophetic tradition which states that if a man engages in sexual relations with another man, then both have committed adultery. The third opinion, shared by Abu Hanifah, is that perpetrators of homosexuality or gayness should be punished with ta'zir, which is a punishment that aims to provide learning and education. The amount of ta'zir punishment will be

determined by the court or judge, and it is applied to crimes or offenses that do not have a clear and definite punishment in the text of the Qur'an and Hadith. According to al-Syaukani, as quoted by Sayid Sabiq, the first view is considered strong because it is based on saheeh nash that has a clear meaning. Meanwhile, the second opinion is considered weak because it relies on qiyas (analogy), even though there is a text (dalil) that regulates this issue, and the hadith used in this opinion is considered weak. Similarly, the third opinion is also considered weak because it contradicts the text that has stipulated the death penalty (hadd punishment), not the ta'zir punishment. According to al-Syaukani, as quoted by Sayid Sabiq, the first view is considered strong because it is based on a saheeh text that has a clear meaning. Meanwhile, the second opinion is considered weak because it relies on qiyas (analogy), even though there is a text (dalil) that regulates this issue, and the hadith used in this opinion is considered weak. Similarly, the third opinion is also considered weak because it contradicts the texts that stipulate the death penalty (hadd punishment) instead of the ta'zir punishment.

Based on a study by Rahmawati (2023), the Islamic view of human nature always links it to the sexual instinct. In Islam, it is seen that the sexual instinct is a biological need that should be fulfilled through marriage. Islam does not consider the sexual instinct as something bad or taboo for humans. However, Islam strongly rejects deviant sexual behavior, such as homosexuality, which can damage the nature of human nature. Islamic law always considers human welfare in dealing with various aspects of life, including spiritual and sexual aspects. One of them is related to the human sexual instinct that comes from the desire of lust that wants to express sex outside the framework of Islamic law. In Islam, sexual deviations that violate human nature, such as same-sex marriage (homosexuality), are strongly emphasized as a serious offense, because they violate the provisions that have been regulated in the Qur'an and al-Hadith, which are the basis of valid Islamic law.

The Compilation of Islamic Law (KHI) clearly prohibits same-sex marriage (homosexual) because KHI regulates marriage which must be heterosexual. This means that the conditions that make a marriage valid in KHI are the existence of an inner and biological bond between a man and a woman, in accordance with the provisions listed in Article 1 letter a, Article 1 letter d, Article 29 paragraph (3), and Article 30 KHI. In KHI, dowry is a gift from the prospective groom to the prospective bride, which can be in the form of goods, money, or services, as long as it is in accordance with the provisions of Islamic law. Article 29 paragraph (3) KHI explains that if the prospective bride or the guardian of the prospective bride does not agree with the representative of the prospective groom, then the marriage contract may not take place. Furthermore, Article 30 KHI explains that the prospective groom is obliged to pay a dowry to the prospective bride with the amount, form and type of dowry to be agreed upon by both parties.

Same-sex (homosexual, gay) marriage in the Compilation of Islamic Law (KHI) is

explicitly stated as invalid because it does not fulfill the conditions necessary for a valid marriage. In addition, in the fiqh view of the scholars, gay marriage is punished as haram, and the sanctions imposed include:

- a. Homosexual (gay) offenders may be subject to the death penalty.
- b. Homosexual (gay) offenders can be punished by stoning, as in the punishment of adultery.
- c. Homosexual (gay) perpetrators can be subject to ta'zir punishment, whose sanctions will be determined by the competent authority or judge.

In addition, several figures also have similar views. The Chairman of the MUI Fatwa Commission, KH Ma'ruf Amin, firmly stated that same-sex marriage is haram. He further said that this act is clearly worse than zina. A similar opinion was also expressed by Farida Prihatini, a lecturer in Islamic law at the Faculty of Law, University of Indonesia. She stated that same-sex marriage should not be practiced because the Qur'an clearly states that marriage is between a man and a woman.

2. Positive Law Assessment of Gay Sexual Behavior

The gay rights situation in Indonesia is complex and reflects the country's social and legal views. Legally, Indonesia does not explicitly address the issue of homosexuality in its positive law. Although homosexuality is not declared a criminal offense in the Criminal Code (KUHP) or the Draft Penal Code, national law in a broad sense does not provide support for the gay community. Article 292 of the Criminal Code, for example, refers to same-sex intercourse with a minor, but the punishment is imprisonment for a maximum of five years. Article 492 of the Draft Criminal Code only prohibits same-sex sexual intercourse with a person who has not reached the age of 18, with a minimum prison sentence of one year and a maximum of seven years. In addition, Law No. 1/1974 on Marriage clearly stipulates that marriage must be between persons of the opposite sex. This reflects a more traditional social view in Indonesia, which considers marriage as an institution limited to between a man and a woman. However, homosexuality is not declared a criminal offense, Indonesian laws and regulations do not provide clear support or recognition for same-sex relationships, and even some penalties may be imposed in the context of same-sex intercourse with a person who has not attained 18 years of age. Indonesia's positive legal perspective does not explicitly address LGBT rights, and their human rights are often not adequately protected in practice. This reflects the need for further awareness and advocacy to protect the rights of LGBT individuals in Indonesia.

3. Comparison Between Positive Law and Islamic Law Related to Gay Sexual Behavior

From the explanation of gay sexual behavior in the perspective of positive law and Islamic law above, after being described and analyzed, two concepts can be identified, namely gay sexual behavior in both legal systems. According to studies from Suwardin (2018); Hayati (2019), this comparison reveals similarities and differences between the two concepts, as follows:

- 1) Similarities between positive law and Islamic law regarding gay marriage:
 - a. The concept of marriage in positive law and Islamic law is the same. Both stipulate that a valid marriage takes place between a man and a woman, known as heterosexual marriage. Therefore, gay marriages involving individuals of the same sex are considered invalid because they do not fulfill the conditions and pillars of a valid marriage in both.
 - b. Homosexual (gay) behavior is considered a criminal act in both positive and Islamic law. In other words, both legal systems treat homosexual behavior as a violation of the law that can be subject to criminal sanctions.

Thus, there are similarities in the views of positive law and Islamic law regarding gay marriage and the assessment of homosexual behavior as a violation of the law.

- 2) The differences between positive law and Islamic law towards gay sexual behavior are as follows:
 - a. In the view of Islamic law, gay sexual behavior is divided into two categories, namely mukhannats khalqy or natural homosexuality, and mukhannats bi al-'amdi or intentional homosexuality. The classical scholars explained that against mukhannats khalqy or natural homosexuals, no reproach or punishment should be given. Reproach and punishment are only applied to mukhannats bi al-'amdi or homosexuals whose behavior is intentional. This view refers to a Prophetic hadith that tells the story of a companion of the Prophet who had female-like behavior, al-mukhannats. It is important to note that the scholars identify mukhannats bi al-'amdi as someone who plays with or makes up his sexual orientation, not as a result of social construction or the influence of the social system. In today's society, this view of the scholars is considered too simplistic.
 - b. In positive law, such as the Criminal Code (KUHP), homosexual/gay acts are categorized as obscene acts. Obscene acts include acts that violate decency or are vile acts of sexual lust, such as kissing, groping breasts, and so on. Obscene acts are considered to violate decency in lust. Article 292 of the Criminal Code regulates obscene acts between adults and minors of the same sex. In positive law, sodomy or liwath is categorized as an offense of decency that is specifically regulated in Article 292 of the Criminal Code. However, the regulation only regulates it in offenses against children. In this case, there is no legal provision that regulates same-sex obscene acts committed by two adults who are of legal age. So, in this case, there is a legal vacuum because Article 292 of the Criminal Code does not specifically regulate it.

In Islam, scholars agree that homosexual acts are haram according to shari'a law. Homosex/gay is considered an abominable act, as is zina. The fiqh scholars have various opinions regarding the punishment that should be imposed on homosexual/gay offenders. There are three different opinions:

- a. The first opinion is the absolute death penalty.
- b. The second opinion is a punishment comparable to that of adultery. If the offender is unmarried, he will be punished with flogging, while if the offender is married, he will be punished with stoning (death).
- c. The third opinion is to give ta'zir punishment. Ta'zir punishment is a punishment that aims to educate, and the level of objection to the punishment is determined by the court (judge).

In addition, there are differences of opinion between the madhhabs in terms of punishment for homosexual offenders. Some madhhabs such as Malikiyah, Hanabilah, and Shafi'iyah are of the opinion that the hadd punishment for homosexuals is stoning (death by stoning) regardless of whether the offender is a virgin or married. However, according to Abu Hanifah's opinion, the homosexual/gay offender should be subject to a ta'zir punishment, which contains educational elements, and the level of objection is left to the discretion of the court (judge). Thus, there is a difference of opinion among scholars on the punishment for homosexual/gay offenders in Islam, which can vary from the death penalty to the educational ta'zir punishment.

CONCLUSION

After a study comparing positive and Islamic law approaches to gay sexual behavior, several conclusions can be drawn. First, both positive law and Islamic law strictly prohibit gay marriage because both legal systems regulate marriage only between two individuals of different sexes (heterosexual). This is reflected in marriage regulations such as the Compilation of Islamic Law (KHI) in Islamic law and Law Number 1 Year 1974 on Marriage in positive law. Second, in positive law, same-sex (gay) sexual behavior is often considered a criminal offense of sexual abuse and is subject to a five-year prison sentence. However, in the Criminal Code (KUHP), the punishment for adult homosexual offenders is not regulated in detail. Third, in Islamic law, there is an agreement among fiqh scholars on the punishment for homosexual offenders. The punishments that can be applied are first, the death penalty (mutak). Second, the punishment is similar to the punishment for adultery, which involves arrest and flogging (for bachelors) or stoning (for married offenders). Thirdly, homosexual offenders may be subject to ta'zir punishment, which is educative in nature and its severity is up to the discretion of the judge. This comparison reveals significant differences between positive and Islamic law approaches to gay sexual behavior, particularly in terms of the punishments meted out and the perspectives used. This reflects the challenges of managing this issue within different legal and religious frameworks.

The researcher has formulated several suggestions in this study, which can be outlined as follows:

1. Advice to the Government:
 - a. It is suggested that the government consider revising or creating new laws that can

effectively protect and safeguard people's rights in accordance with democratic principles.

- b. In terms of citizens' rights, the government is expected to pay special attention to issues of sexuality that often disadvantage individuals with homosexual orientation. This is due to a lack of understanding on the part of the public regarding variations in sexuality.
 - c. In legislation, the government should be able to accommodate the rights of its citizens, especially for individuals with different sexual orientations, and make efforts to socialize the various sexual orientations that exist in society.
 - d. The importance of the local government's participation in understanding the issues surrounding sexuality and sexual orientation, and making policies that support socialization and education for the people in the area.
2. Suggestions to the Community:
- a. The community should not discriminate against individuals with different sexual orientations, because all citizens have the right to be respected and protected.
 - b. It is suggested that the community should not take legal action themselves in the event of homosexual behavior that is considered to violate the prevailing values in society. It is better to leave this matter to the law enforcement authorities in order to maintain public order and security.

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