
**The Harmonised Shari'ah and
Human Rights on Lesbian, Gay,
Bisexual and Transgender (LGBT)**

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Abstract

This article has an objective to analyse the phenomenon of Lesbian, Gay, Bisexual and Transgender (LGBT) through the lens of harmonisation between *shari'ah* and human rights. Although in general the LGBT groups have faced challenging realities of discrimination and it encourages them to become minority and vulnerable groups, they are human being who have dignity. It means their dignity must be respected and protected. In dealing with this issue, some scholars have covered it either via the perspective of *shari'ah* or human rights. However, the study that has focused on the issue using the perspective of harmonic elaboration between *shari'ah* and human rights has remained in absence. Accordingly, this article will consider the issue using the perspective and the approach of *maqāṣid al-shari'ah*. This article argues that what *shari'ah* and human rights believe in relation to human dignity is not contradictory. Consequently, it is important to reconstruct the understanding of Islamic jurisprudence that is more humanistic. Therefore, in the context of LGBT, *shari'ah* and human rights can be united in a harmonious perspective.

Abstrak

Artikel ini bertujuan menganalisis fenomena LGBT melalui perspektif harmonisasi *sharī'ah* dan hak asasi manusia (HAM). Kendati secara umum kelompok-kelompok LGBT harus menghadapi tantangan diskriminasi dan hal itu membuatnya menjadi minoritas dan kelompok yang rentan, mereka sebenarnya adalah manusia yang memiliki martabat kemanusiaan. Artinya, martabat mereka sebagai manusia harus dihormati dan dilindungi. Berkaitan dengan isu tersebut, beberapa sarjana membahasnya melalui perspektif *sharī'ah* atau HAM. Akan tetapi, kajian yang memiliki perhatian khusus membahas isu tersebut berdasarkan sudut pandang elaborasi harmonistik antara *sharī'ah* dan HAM, tampaknya belum ada. Karena itulah, artikel ini akan mempertimbangkan isu tersebut menggunakan perspektif harmonis dan pendekatan *maqāṣid al-sharī'ah*. Artikel ini mengajukan argumentasi bahwa apa yang diyakini baik itu oleh *sharī'ah* maupun HAM dalam kaitannya dengan martabat kemanusiaan, tidaklah bertentangan. Konsekuensinya, penting kiranya membangun pemahaman *fiqh Islam* yang lebih humanis. Dengan demikian, dalam konteks kasus LGBT, *sharī'ah* dan HAM sebenarnya dapat disatukan melalui perspektif harmoni.

Keywords: *Maqāṣid al-sharī'ah*; *maqāṣidi* approach; *sharī'ah* and human rights; harmonistic perspective; harmonised *sharī'ah* and human rights; LGBT.

Introduction

This article aims at studying the phenomenon of Lesbian, Gay, Bisexual and Transgender (LGBT) through the perspective of harmonisation between Islam and human rights. In dealing with the study, this article arguably contends that principally what Islam and human rights advocate in relation to human dignity is neither in tension nor in conflict. What makes it conflictual is the traditional understanding of Islamic texts (scripturalism). Reconstructing the understanding of classical Islamic jurisprudence (*fiqh*) enables the reestablishment of a more humane jurisprudence. That is where Islam and human rights in the context of LGBT can be allied in a harmonious perspective.

The study of the relationship between religion and human rights in the context of LGBT is quite diverse. For example, Masthuriyah Sa'dan, in his work, explores the issue of LGBT in the perspective of Islam and human rights.¹ He believes that human rights at all levels (regional, national and international levels) have already protected certain sexual orientations, including LGBT. However, there remains a negative stigma against LGBT people. They are even vulnerable to discrimination and intolerance in the name of religion. At this point, according to him, religion has been so misunderstood that instead of providing a way of salvation, it becomes a divergence between God and his own people.

According to Sa'dan, religion encourages people to know each other, inclusive to all people including that of different gender. Piety, in addition, is what distinguishes a person to another one. Religion must be interpreted in such a way that can bring peace for all. It should not be utilised as a source of harassment. In this way of thinking, LGBT sexual orientation will have a place in society.

Noah Arif Safri in his article titled "The Acceptance of Transgender's Families (Case Study on Transgender at Pesantren al-Fath Yogyakarta)"² states that transgender people who dare to reveal their identity to their family face either subtle or harsh rejection. Whereas the only motivation they reveal their identities in the first place is due to their need of familial support in their lives. Most families reject the notion for religious reasons insisting that religion does not acknowledge gender other than men and women. Accordingly, the rejection in the name of religion is the most persisting

¹ Masthuriyah Sa'dan, "Agama dan HAM Memandang LGBT," a paper presented in the Metro International Conference on Islamic Studies (MICIS), (Lampung: STAIN Jurai Siwo Metro, 2016), 16.

² Arif Nuh Safri, "Penerimaan Keluarga Terhadap Waria (Studi Kasus atas Waria atau Transgender di Pesantren Waria al-Fath Yogyakarta)," a paper presented in the Metro International Conference on Islamic Studies (MICIS), (Lampung: STAIN Jurai Siwo Metro, 2016), 26.

problem in transsexual life. Such rejection boils down to a stereotype that transsexual behavior is accursed. In addition to religious reasons, rejection is also made in the name of society especially the embarrassment that the family feels when they are related to transsexual people. At the end of his article, Safri proposes that family is important to protect transgender community. Family must be a shelter for them but first, it can only be achieved by changing the perspective against transgender.

Misri Gozan in his article, "Homosexuality Behavior: Finding the Genealogical Root Factor"³ suggests that homosexuality is not only caused by genetic factors but also environmental ones. Various researches find that there is no specific gene serving as a sole factor in homosexuality. In other words, it is environmental factors that play a larger role in the construction of homosexuality. These environmental factors can be in the form of stimuli or the availability of information in various medias. Thus, according to him homosexuality can be cured or prevented.

None of these literatures sees LGBT as vulnerable group. In addition, they do not provide a more harmonious approach to bridge Islam and human rights perspectives in LGBT context.

This article emphasises a balance by looking at the spirit carried by Islam and human rights, both of which promote and protect human dignity. Accordingly, it is possible to bring Islam and human rights in the context of LGBT to a harmonious perspective. In elaborating the concept, this article plays the roles of the *maqāṣid al-sharī'ah* analysis which essentially upholds the protection of life and human dignity. It leads to the fact that human rights similarly aspire to protect human dignity within legal and specific framework.

In addition of this part, the next section discusses the theory behind this issue and the possibility to include LGBT as vulnerable groups both in the perspective of Islam and human rights then combine them in a harmonious perspective. The final section of this article is the finding which consists of specific arguments and brief intellectual reflection.

³ Misri Gozan, "Perilaku Homoseksualitas: Mencari Akar Faktor Genetis," a paper presented in the Metro International Conference on Islamic Studies (MICIS), (Lampung: STAIN Jurai Siwo Metro, 2016), 75.

The concept of vulnerable and disadvantaged groups

To discuss this issue, it is important to understand the concept of vulnerable and disadvantaged Groups. In this case, TSN Sastry, one of scholars from the University of Pune gives the following description,

In the language of human rights vulnerable groups may be defined as, certain groups of population who often encounter discriminatory treatment, or need some kind of special attention for protection of the State to avoid exploitation or from a harmful environment... People who are discriminated based on sex, race, by birth in a particular community, religious or disability or any other criteria that is specific to each society may generally described as disadvantaged people.⁴

In the above description, vulnerable groups are understood as groups that often face discrimination or those who need special attention from the State. Meanwhile, disadvantaged groups can be understood as those who experience discrimination based on sex, race, religion, and specific conditions. Therefore, the term “vulnerable and disadvantaged” are not to be separated.

Vulnerable and disadvantaged groups are a logical consequence of discrimination. Discrimination is generally understood as the difference in treatment caused by color, race or ethnicity, and may also due to differences in the type of sex, economics, religion and others,⁵ which clearly violates the basic principles of human rights. The term discrimination is typically used to refer to an action on the part of the dominant majority in relation to the weaker minority. Such behavior is considered as immoral and non-democratic.⁶

The term minority, in this case is understood as a group whose number is much smaller compared to other groups in society. It also tends to encompass vulnerable and disadvantaged groups. They are usually disadvantaged as a result of discriminating acts. Besides, they are alienated by the majority group. The group is physically and socially isolated from the larger community.⁷ Looking through this

⁴ TSN Sastry, *Human Rights of Vulnerable & Disadvantaged Groups* (India: University of Pune, 2012), 11.

⁵ Fulthoni et. al., *Buku Saku untuk Kebebasan Beragama, Memahami Diskriminasi*, edited by Muhamad Yasin (Jakarta: The Indonesian Legal Resource Center/ILRC, 2009), 3.

⁶ Fulthoni et. al., *Buku Saku untuk Kebebasan Beragama*, 3.

⁷ Ahmad Suaedy et. al., *Islam dan Kaum Minoritas: Tantangan Kontemporer* (Jakarta: The Wahid Institute, 2012), 7.

concept, LGBT can be included in the framework of vulnerable groups and disadvantaged groups.

Human rights protection efforts for vulnerable and disadvantaged groups

At the international level, several documents containing regulations related to the vulnerable group are the Universal Declaration of Human Rights 1948, the Declaration on the Rights of the Child 1959, the Declaration on the Elimination of Discrimination against Women 1967, the Declaration on the Protection of Women and Children in Emergencies and Armed Disputes 1974, the Declaration on the Rights of People with Mental Health 1971, the Declaration on the Rights of Disabled Persons 1975, the Declaration on the Protection of All Persons from Enforced Disappearances in 1992, Declaration on the Elimination of Violence against Women 1993, and the United Nations Declaration on the Rights of the Indigenous People in 2007. These declarations are then reformulated and made into jurisdictional instruments which have legal power. Additionally, UDHR 1948 consists of two main instruments, namely the International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966.

Other international human rights instruments that directly outline certain provisions contained in the 1948 UDHR are the Convention on the Status of Refugees 1951, the Convention on Political Rights of Women 1952, the Convention relating to the Status of Stateless Persons in 1954, the Convention on the Reduction of Statelessness in 1954, and the Convention on the Nationality of Married Women 1957.

Furthermore, there are other international human rights instruments such as the Convention on the Rights of the Child 1989 (derived from the Declaration on the Rights of the Child 1959), the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (derived from the Declaration on the Elimination of All Forms of Racial Discrimination 1963), Convention on the Elimination of All Forms of Discrimination against Women 1979 (derived from the Declaration on the Elimination of Discrimination against Women, 1967), Convention on the Rights of Persons with Disabilities 2006 (derived from the Declaration on the Rights of Disabled Persons 1975), The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment of Humanity in 1984 (derived from the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975), and International Convention for the Protection of All Persons from Enforced Disappearances 2006 (derived from the Declaration on the Disappearance of All Persons from Enforced Disappearances 1992).

These instruments are then translated into other instruments aimed at protecting vulnerable and disadvantaged groups. For example, the International Convention on

the Protection of the Rights of All Migrant Workers and Their Family Members 1990. The Convention is a derivative of the UDHR 1948, ICESCR 1966, ICCPR 1966, International Convention on the Elimination of All Forms of Racial Discrimination 1965, Convention on the Elimination of All Forms of Discrimination against Women 1979, and the Convention on the Rights of the Child 1989.

The documents mentioned above contain various basic rights of vulnerable groups. The world has actually acknowledged the rights of LGBT minority group including the right to equality and non-discrimination, the right to be recognised before the law, the right to life, the right to personal security, the right to privacy, the right against abuse, the right to freedom of opinion and expression, the right to freedom of association and peaceful assembly, the right to freedom of thought, awareness, and religion, the right to freedom of movement or mobility, the right to form a family, the right to participate in public life or government, the right for work, the right to social security and protection, the right to an adequate living standard and the right to adequate housing, the right to education, the right to the highest attainable health standard, the right to effective remedies and redress.

At the national level, regulations related to LGBT as vulnerable people are actually existed such as the Indonesian Constitution of 1945 and the Law Number 39 of 1999. Both documents contain basic rights for citizens including LGBT as vulnerable people with their status as citizens. These rights cover the right to life, the right of self-development, the right to religion, the right to trust, the right to freedom of association, assembly and expression of opinions, the right to communicate and obtain information, the right to personal and family protection, the right to physical and mental welfare, the right to the application of human rights under any circumstances, the right to legal and economic rights, the right to education, the right to cultural guarantees and protections, the right to economic and natural resources, and social welfare rights.

Sex, gender and sexual orientation

As an object of study, sexuality has quite a broad meaning. Sexuality includes the concepts of sex, gender, sexual orientation and gender identity, sexual identity, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs or values, behaviors, habits, roles and relationships. Yet, not all aspects of sexuality are always experienced or

expressed. Sexuality is influenced by many factors. Some of these include biological, psychological, social, economic, political, historical, religious and spiritual factors.⁸

In this sub-section, three important concepts will be discussed in sexuality namely sex, gender, and sexual orientation. Sex can be simply translated as more of biological aspects. Myrtati D. Artaria in her essay entitled "Biological Basis for Variations on Gender and Sexual Orientation" shows that human sex is not limited to male and female.⁹ According to Artaria, at the beginning of pregnancy, all kinds of sex is female. In the eighth week, the process of masculinisation and defeminisation begins if there is a Y element in the chromosome. This Y element releases male hormones to create the male sex. There are times when the process does not perfectly run called masculinisation as opposed to defeminisation.¹⁰

How to explain an individual who is neither male nor female? If a woman has an XX chromosome and a man has an XY chromosome, what about individuals who have XXX or XXY chromosomes? And what about individuals who only have one X chromosome? This illustrates the complexity of sex contrary to people's belief. One explanation is that there are types of sex beside men and women. Individuals who have XXY chromosomes in the medical world are called Klinefelter. In the UK, there is one Klinefelter out of 650 births. In America, there is one in a hundred births. Likewise, births with an XXX chromosome are estimated to be one in a thousand births.¹¹ Statistically the numbers are very small but are those small numbers not considered gender? Are individuals who have chromosomes outside of XX and XY normal?

Artaria believes that individuals who have their XXY chromosome are more active than normal children. Meanwhile, individuals with XXX chromosomes generally experience abnormalities in their reproductive organs that they do not go through puberty.¹² Because individuals who have the XXY chromosome are more active, they often cause troubles in the class. Consequently, they are sometimes deemed abnormal despite debate on term normal and abnormal. Meanwhile, individuals who have XXX chromosomes are usually called infertile. The question is whether the term

⁸ Divisi Litbang dan Pendidikan Komnas Perempuan, *Dari Suara Lesbian, Gay, Bisexual, dan Transgender (LGBT): Jalan Lain Memahami Hak Minoritas* (Jakarta: Divisi Litbang dan Pendidikan Komnas Perempuan, 2015).

⁹ Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," *Jurnal BioKultur* 5, no. 2 (2016): 158.

¹⁰ Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 159.

¹¹ Myrtati D. Artaria. "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 159.

¹² Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 159-160.

used to refer to individuals with reproductive organ disorders is abnormal even though it is genetically caused?

Other sex types beside men and women are hypospadias, ambiguous genitalia and androgen insensitive syndrome (ASI).¹³ There is also a sudden transformation from female to male during puberty due to the absence of the enzyme 5 alpha reductase. These changes include sexual orientation. Even though the individual is raised as a woman, when she grows up to be male her sexual orientation turns as well to that of male. In the case of ASI, the individual biologically has a male chromosome which is XY but his body is not sensitive to masculine hormones. Eventually, external reproductive organs such as women, including breasts, are formed, but are unable to reproduce naturally due to the absence of ovaries.¹⁴

In the case of Ambiguous Genitalia, it is not even known whether these individuals are male or female. Another example is Kallmann Syndrome. In this case, there is a genetic disorder that causes the function of sexual hormones become neither that of men nor women. It also causes a lack of masculine hormones.¹⁵

What happens in society is a lack of knowledge about genes in a person. This raises the understanding that sex is only limited to two kinds; either male or female. Consequently, sex outside these two is considered abnormal while in fact, there are many other variants beside men and women.

The second conception is gender. Gender is a social role identified to a particular sex. For example, in a household, who is in charge of cooking on a daily basis? Who has to take care of children? Who has to work outside the home to make a living? In such cases, each culture may have a different answer because social roles are more about socio-cultural agreements. Thus, social role is very fluid depending on how each culture constructs it. The role associated with male sex is generally called masculine. Meanwhile the social role identified with the female gender is called feminine. Therefore, masculinity and femininity in each culture can be different.

Then, is there likely a gender outside feminine and masculine? The answer is very likely because gender issues are very flexible. A man who plays the role of a woman

¹³ Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 160.

¹⁴ Although raised as a woman to the age of puberty, she then turned into a man growing up. This type still has a sexual orientation towards women. In other words, the environment which treats as a woman does not immediately change her sexual orientation. See Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 160.

¹⁵ Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 160.

or *vice versa*, is actually included in the gender variant. This is what then is called transgender. It is gender that deviates from the roles associated with particular gender. This allows the emergence of trans-men and trans-women. Trans-men are men who play roles that deviate from the roles identified with their sex. Trans-women are the opposite of that. The social role that is carried out is not in accordance with the social role identified by the sex. In certain cultures, this is sometimes considered to be an irregularity. At this point, it can be understood that the issue of gender is indeed a matter of sociocultural construction. This gender issue is more about the role and identity. Therefore, in many studies this problem is usually referred to as gender identity.

What about sexual orientation? How to explain homosexuality? Does gender affect sexual orientation? Or is sexual orientation influenced by the environment? Artaria suggests interesting findings that 1500 animal species studied have same-sex attraction.¹⁶ In the animal kingdom, this is certainly not due to association with sex or environmental influences. How can this explain homosexuality in humans? It is well known that humans belong to the animal kingdom, not the plant kingdom. Therefore, it can be inferred that there is a human species that have an interest in the same sex. This is certainly not because of wrong association or environmental influences. Thus, it can be concluded that same-sex attraction or homosexuality is a natural thing. Alfred Kinsey (1948) in his book "Sexual Behavior in The Human Male" as quoted by Artaria, mentions that ten percent of men are homosexual.¹⁷ Hence, homosexuality in humans is one of sexual orientation.

Le Vay and Hammer in an essay published in Scientific American state that INAH 3 cells in hypothalamus¹⁸ among the homosexual men are smaller in size than heterosexual men. INAH 3 cells in homosexual men are smaller in size, resembling those of women.¹⁹ This is what causes a man to have a homosexual sexual orientation.

In women, a condition that can occur is adrenogenital syndrome (AGS). That is a condition where the adrenal glands do not produce enough cortisone.²⁰ The pituitary gland knows this and then secretes a lot of hormone corticotrophin to increase cortisol. This hormone causes the adrenal glands to produce too much intermediary hormone, and causes virilisation. Female babies who experience AGS will have an

¹⁶ Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 161.

¹⁷ See Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 161.

¹⁸ The hypothalamus is a part of the brain.

¹⁹ Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 162.

²⁰ Cortisone is a hormone secreted by the adrenal skin glands.

external or outer genitals resembling male genitalia. This will affect behavior, manners, more aggressive attitudes, more gender roles to men including appearance and sexual orientation.²¹

To conclude, sex, gender, and sexual orientation are complex, contrary to what people may have assumed. Knowledge is the initial step to restructure paradigms and attitudes towards fellow human beings.

Questioning LGBT: The sociological perspective

This section discusses LGBT as a phenomenon in a theoretical perspective. LGBT can be analysed through the perspective of symbolic interactionism. One of the leading figures in the theory is George Herbert Mead. Mead believes that the personal behavior of each individual is a common thread of complex entity relations within society. Behavior that appears in individuals has a social relationship to other groups as a whole. For Mead, individuals are also creative beings. Individuals can change according to the dynamics in a group of people. Interaction between individuals in society can lead to certain actions.²² What Mead elaborates may explain how LGBT behaves. LGBT is the result of interactions between individuals. Thus, in this perspective, LGBT behavior actually does not just emerge. However, there are many things that become the cause of the behavior. It arises with the interaction of the subject with other subjects or even with what is called by Mead with the term community.

Interactionism is actually a new perspective in sociology. Before developing the interactionist perspective, structural functionalism perspective is initially established. In this section, it is necessary to fairly review the perspective of structural functionalism. One of the figures here is Talcot Parson. Parson is an American sociologist who conclusively uses a functionalism approach in looking at society. For him, the community is created from systems and structures that function autonomously and internally. The basic assumption of this theory is that society is integrated on the basis of the agreement of its members regarding certain values.²³ For Parson, it is not the attitude of the individual in society, but the norms and values as an individual's guide and regulator which matters. In this case, Parson sees that individual behavior is influenced by three systems namely social, cultural, and

²¹ Myrtati D. Artaria, "Dasar Biologis Variasi Jenis Kelamin, Gender dan Orientasi Seksual," 163.

²² Herman Arisandi, *Buku Pintas Pemikiran Tokoh-Tokoh Sosiologi dari Klasik Hingga Modern Biografi, Gagasan dan Pengaruhnya terhadap Dunia* (Yogyakarta: Icisod, 2015), 104.

²³ Herman Arisandi, *Buku Pintas Pemikiran Tokoh-Tokoh Sosiologi*, 131.

personality systems.²⁴ In LGBT context, the structural functionalist perspective assumes that Indonesian society uses certain norms which in this case are primarily religious norms as standards that must be adhered to by the community. Religion which in this case is Islam requires that sex is only either male or female, while sexual orientation is only heterosexual. Therefore, sex and sexual orientation other than those mentioned are irregular. The structural functionalist shows LGBT as a deviant attitude because it is at odds with structures that have prevailed or functioned autonomously and internally in Indonesian society.

Another leading scholar in sociology is Max Weber, a well-known German sociologist. He is one of the founders of the exploratory sociology using the *verstehen* method. Weber offers a perspective with his theory of social action. For Weber, not all actions taken by humans have meaning. Therefore, only meaningful actions need to be examined as objects of study in social science. Then, Weber divides meaningful social action into four categories namely rationally-purposeful action, value-rational, affective, and traditional action.²⁵

Rationally-purposeful actions are actions carried out by someone based on conscious considerations and choices related to the purpose of the action. An example is students who are often late because they do not have means of transportation and then buy a bicycle so they can arrive on time. This means that the choice has been deliberated in such a way as to achieve certain objectives. Meanwhile, the value-rational action is in which its existing tools are conscious balancing and calculation. For instance, the behavior of someone who gives a seat to a passenger who is elderly. These actions have been contemplated beforehand by prioritising certain social values. Thirdly, affective action is more dominated by feelings or emotions without conscious planning such as a mother who loves her children unconditionally and acts in certain ways as a form of love for her children. The action is based on certain feelings without planning or detailed thought. Lastly is traditional action in which there are times when an action is carried out because of habit. This action is also without conscious consideration for example, the habit of going home at certain times.

LGBT behavior in a Weber perspective is included within rationally-purposeful action. The action is carried out with conscious consideration in relation to certain objectives. In this case, the goal can be either satisfaction or comfort.

²⁴ Herman Arisandi, *Buku Pintas Pemikiran Tokoh-Tokoh Sosiologi*, 133-134.

²⁵ Herman Arisandi, *Buku Pintas Pemikiran Tokoh-Tokoh Sosiologi*, 66-67.

In line with Weber's instrumental rational action, it is George Homans with his theoretical proposition that an action carried out by someone is essentially accompanied by a cost-benefit consideration. This is usually referred to as social exchange theory. Homans believes that the actions of an individual with another are done because they expect something in return.²⁶ Can LGBT as an action be explained from this perspective? If LGBT is an action or behavior, then in the perspective of Homans, the individual has thought about what he will get and what he will sacrifice. The action expects a reward whether it is pleasure or satisfaction.

Essentialism *vis-à-vis* social constructionism

There are two opposing views on sexuality. There is a group that bases sexuality on the flow of essentialism. On the other hand, another group bases its views on the theory of social constructionism.²⁷ Both of these views are quite influential in society. Essentials believe that gender, sexual orientation and gender identity are given. They also believe that there are only two sexes, namely male and female. The only sexual orientation is heterosexual while gender identity must follow its gender; either feminine or masculine. The consequence of this view is that humans outside these are considered as abnormal.

Social constructionism theory believes the opposite. They consider gender, sexual orientation, and gender identity as the result of social construction. Thus, within the framework of this theory, sexuality is something that is very flexible. Therefore, sex is not only limited to male and female, but also intersex and gender or transsexual. Sexual orientation is not only heterosexual but also homosexual and bisexual. Thus, it can be said that the social constructionism revises almost the entire view of essentialism. Below is a chart to illustrate the description,

	Essentialism	Social Construction
Sex	Male and female	Male, female, intersex, and transgender
Gender	Feminine and masculine	Feminine, masculine, androgynous, undifferentiated
Sexual orientation	Heterosexual	Heterosexual, homosexual, bisexual

The chart of comparison between essentialism and social construction on sex, gender and sexual orientation.

²⁶ Lukman Hakim, *Teori Pertukaran Sosial dalam Anatomi dan Perkembangan Teori Sosial* (Malang: Aditya Media Publishing, 2010), 239-240.

²⁷ Divisi Litbang dan Pendidikan Komnas Perempuan, "Dari Suara Lesbian."

Essentialism is a view that is shared by the majority of Indonesian people since it is legitimated by religion and culture. Consequently, sex, gender, and sexual orientation outside the view of essentialism are considered to be deviant and deserve discrimination in many ways.

How the classical jurisprudence (*fiqh*) views LGBT

As a vulnerable group, LGBT people face considerable challenges mainly from religion as a cultural structure. This hinders this sexual-orientated-minority LGBT from getting their basic rights. In addition, these groups often encounter systemic violence and discrimination. Religion is used as a justifying means to discriminate against the group.

LGBT in Islamic studies is seen from the verses of the Qur'an and related to homosexual behavior. The Quranic view of homosexuality is illustrated in the story of the Prophet. It is mentioned in the Qur'an surah al-Shu'arā: 160-173, which means:

The people of Lot denied the messengers. When their brother Lot said to them, "Will you not fear Allah? Indeed, I am to you a trustworthy messenger. So fear Allah and obey me. And I do not ask you for it any payment. My payment is only from the Lord of the worlds. Do you approach males among the worlds? And leave what your Lord has created for you as mates? But you are transgressing people. They said, "If you do not desist, O Lot, you will surely be of those evicted." He said, "Indeed, I am, toward your deed, of those who detest." He then prayed "O My Lord, save me and my family from [the consequence of] what they do." So We saved him and his family, all Except an old woman (his wife) among those who remained behind. Then We destroyed the others. And We rained upon them a rain [of stones], and evil was the rain of those who were warned.

Also in surah al-A'raf verses 80-84, which means:

And (We sent) Lot when he said to his people: What! do you commit an indecency which anyone in the world has not done before you? Most surely you come to males in lust besides females; nay you are an extravagant people. And the answer of his people was no other than that they said: Turn them out of your town, surely they are a people who seek to purify (themselves). So We delivered him and his followers, except his wife; she was of those who remained behind. And We rained upon them a rain; consider then what was the end of the guilty.

The Qur'an does not literally mention the word homosexual (*liwath*) or even sexual orientation. However, the Qur'an attaches such word with the word *al-fakhshā'* which means a heinous act in the surah al-A'raf verse 80, *al-sayyi'* in the surah Hud verse 78, *al-khabā'ith* in the surah al-Anbiyā' verse 74 and the word *al-munkar* in the surah al-Ankabut verse 21. In the Qur'an itself, there are no specific words about homosexual, gay, lesbian, bisexual or asexual. The Qur'an calls these acts in the words above. However, it is important to note that the words mentioned above are most likely applicable to anyone not limited to homosexual or heterosexual. The word *al-fakhshā'* itself is repeated seven times in the Qur'an. Many people committed a heinous act therefore needed God's equal retribution.

Besides the Qur'an, the Prophet's hadiths are also used as a reference regarding homosexuality, among them is written below which means;²⁸

Abd al-Rahman, the son of Abu Sa'id al-Khudri, reported from his father: The Messenger of Allah (may peace be upon him) said: "A man should not see the private parts of another man, and a woman should not see the private parts of another woman, and a man should not lie with another man under one covering, and a woman should not lie with another woman under one covering." (Translation of Sahih Muslim)

Narrated by Abdullah ibn Abbas, the Prophet said: "If you find anyone doing as the Lot people did, kill the one who does it, and the one to whom it is done." (Narration from Imam Rawi hadist except al-Nasa'i).

Ahmad narrated from Ibn 'Abbas that the Prophet of Allah said: "May Allah curse the one who does the action of the people of Lot, may Allah curse the one who does the action of the people of Lot, three times." (Hadist narrated by al-Nasa'i)

Of verses and hadith above, Islamic scholars have performed *ijtihad* on sexual orientation issue. Hanafi, Maliki, Shafi'i and Hambali have agreed on the prohibition. The scholars analogise this issue with the case of adultery. Thus, the punishment is equated with that of adultery although they are still in dispute over the form of punishment; stoning, exile, or *ta'zir*.

It is undeniable that religion significantly influences culture and society. On the other hand, the state which actually has guaranteed their rights as citizens is more subdued because of the pressure from culture driven by certain interpretations of religion.

²⁸ Wawan Gunawan A. Wahid, "Perilaku Homoseks Dalam Pandangan Hukum Islam," *Jurnal Musawa* 2, no. 1 (2013): 23-25.

Although the interpretation is not absolute but open to reconstruction and deconstruction.

Fiqh, which according to Auda is a significant part of religion, according to the traditional Islamic terminology has shifted. For the modernists, jurisprudence is outside of *shar'iah* (religion). Even for the postmodernists, jury who produces jurisprudence always has what is referred to the competent worldview (a methodological ability and hidden interests of the jury). Accordingly, a jury tends to be biased towards whatever his tendencies and interests are. At this level, jurisprudence falls to relativism in the sense that no one can guarantee the truth of a legal product resulting from an *ijtihad*.²⁹

The interpretation of the above verses clearly does not endorse the practice of sexual orientation that “deviates” from the traditional ones because it is considered contrary to human nature. The most fundamental problem is that the label deviation from sexual orientation is often the starting point for a series of human rights violations against this minority group.³⁰ These public assumptions open up opportunities for systemic discrimination which are the cause of limited or even neglected basic rights.

Besides, it has become a common awareness that human rights only apply to mainstream sexual orientation, namely that of men and women. As such, these groups often become victim to human rights restrictions or violations. For example, it is hard for a gay to be accepted at work although in fact, the right to work is the right of every individual. Access to education can also be limited. In public life, they also tend to face systemic discriminatory treatment.

Not only in the context of work and education. Other basic rights are also to be limited. For example, the right to freedom of expression and assembly, the right to health, the right to education, the right to public participation, immigration and refugee issues, as well as various other basic rights. This minority group is often underestimated or even considered potentially damaging to the social order.

The term LGBT identity is publicly acknowledged for their sexual orientation, but their basic rights are unrecognized and even deemed immoral or accursed. This view is usually used as a justification for violating the rights of LGBT people.

²⁹ See Jaseer Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: IIIT 2007), 204.

³⁰ Pelapor Khusus tentang Hak-hak Minoritas, *Mengakui Minoritas! Kajian tentang Kelompok Minoritas dan Kewajiban Negara untuk Menjamin Hak-haknya* (Jakarta: Komnas HAM, 2016), 119.

It is understood that discrimination based on LGBT sexual orientation is far more complex compared to discrimination on other issues. Violence in LGBT groups has even increased from time to time. If it is to be mapped, violence usually consists of three forms. The first is physical violence, in the form of assault, coercion or rape. The second is symbolic violence, in the form of labelling terms such as deviant, abnormal, sick, or uncivilised and immoral. The third is structural violence, which occurs because of a state system that does not provide protection for LGBT groups.³¹

Human rights protection efforts for LGBT groups

Inadequate understanding of sexuality results in non-mainstream sexual orientation and gender identity groups having to face various human rights violations. They can be in the form of restrictions on access to education and health, neglect, discrimination, non-recognition, violence, rape and even murder. Usually these varied series of violations are interrelated and systemic.

The protection of human rights for LGBT groups is not specifically mentioned in human rights documents. They provide protection of human rights in general, not for specific groups. However, this raises a global perception that sexual orientation groups and non-mainstream gender identities are not eligible to enjoy human rights. Specific mechanisms are still needed for protecting the human rights of non-mainstream sexual orientation and gender identities groups.

In order to provide specific human rights protection for this group, a document called the Yogyakarta Principles on the Application of International Human Rights Law regarding Sexual Orientation and Gender Identity or commonly called The Yogyakarta Principles is born. This document contains the principles of protection for sexual orientation and gender identity groups. This document is intended as a technical guide to provide human rights protection for lesbian, gay, bisexual and transgender groups.

The Yogyakarta Principles are developed in 2016 by human rights experts from various countries. This document is called the Yogyakarta Principles because this document is prepared in Yogyakarta. This document is not an official document, however, it is the most comprehensive and specific reference on human rights protection mechanism for non-mainstream sexual orientation and gender identity (LGBT).

The document is intended as a recommendation for universal standards. It is established based on many cases of discrimination and violence against sexual

³¹ Pelapor Pelapor Khusus tentang Hak-hak Minoritas, *Mengakui Minoritas! Kajian tentang Kelompok Minoritas dan Kewajiban Negara untuk Menjamin Hak-haknya*, 121.

orientation and gender identity group from various countries. Experts agree that sexual orientation and gender identity are parts of human dignity thus requires protection.

The Yogyakarta Principles contain the following principles: Principle 1, the right to enjoy universal human rights. Principle 2, rights to equality and non-discrimination. Principle 3, the right to be recognized before the law. Principle 4, the right to life. Principle 5, the right to security. Principle 6, the right to privacy. Principle 7, the right to be free from arbitrary termination of freedom. Principle 8, the right to a fair trial. Principle 9, the right to humane treatment in detention. Principle 10, the right to freedom from torture and cruel, inhuman and degrading treatment or punishment. Principle 11, the right to protection from all forms of exploitation and human trafficking. Principle 12, the right to work. Principle 13, the right to social security and other social protection measures. Principle 14, the right to an adequate standard of living. Principle 15, the right to adequate settlement. Principle 16, the right to education. Principle 17, the right to the highest attainable health standards. Principle 18, the protection from medical abuse. Principle 19, the right to freedom of opinion and expression. Principle 20, the right to freedom of peaceful association and assembly. Principle 21, the right to freedom of thought, belief and religion. Principle 22, the right to freedom of movement. Principle 23, the right to seek asylum. Principle 24, the right to form a family. Principle 25, the right to participate in public life. Principle 26, the right to participate in cultural life. Principle 27, the right to advocate human rights. Principle 28, the right to effective recovery and compensation. Principle 29, additional accountability and recommendations.

These principles above are attempts to maintain and protect human dignity of LGBT group. Therefore, these 29 principles are very important to understand and implement. At this point, it is very clear that there is a contradiction between fiqh and human rights.

Understanding Minority-group LGBT in the perspective of harmony

As explained earlier that non-mainstream sexual orientation and gender identity (LGBT) groups face quite serious challenges. These arise from religion as a cultural and social structure. Interpretation of religion puts Islam as a religion that rejects the group and considers them as “damned” people. In this context, it has become a collective awareness of the community that the group is a deviant group and may not exist despite the existing regulation of their rights. This leads to discriminatory treatment which results in the reduction or even neglect of the rights of those having different sexual orientation from the majority.

Looking back to what happened to the society of Lot is indeed a true lesson for people after them. It is also true that they were drowned by Allah (punished) because of their sins. It is important here to reconstruct understanding related to the causes of the punishment against the people of Lot.

It is very interesting to note that Mun'im A. Sirry's book entitled "The Polemic of the Scriptures: Reformist Interpretation on the Qur'anic Criticism of Other Religions" especially related to the Prophet stories. Many Prophets mentioned in the Qur'an hermeneutically have a pattern. There were people who deviated, then Allah sent a Prophet to give a warning. When some of them refused, God sent punishment against them.³²

In the case of the Prophet Lot, they carried out violence against guests who came to their territory. The male guests are victims of sexual violence committed by their men. Meanwhile, female guests who came to their region were victims of sexual violence committed by their women. In this case, violence is absolutely unjustifiable. That was why the Prophet tried to warn them, but they rejected it so they were punished by Allah. They were punished for sexual violence. The punishment is due to their moral damage that has exceeded the limit. As for homosexual behavior, no law is existent on the matter. Therefore, if the rule of "*al-aşlu fı al-asyā'i al-ibāhah, illā ma dalla dalilun 'alā khilāfihı*" (that everything in *mu'āmalah* or the civil transaction is basically permissible unless there is an argument which forbids) is used to justify then homosexuality is allowed as long as there is no violence because this issue is a matter outside of worship.

Another problem in the context of jurisprudence is jurists (*fuqaha*) who often face choices that fall on grey areas. The choice is between forbidding or justifying. This is due to partiality in judgement. Besides, the interests of a jury often influence the context of the law produced.

Today, the mindset or logic of legal methodology must be more comprehensive, hermeneutical, and integral. In a sense, it does not just refer the law to sacred texts but aspects of humanity must also be taken into consideration. Therefore, the growing discourse on human rights should be reflected by contemporary jurists.

How to see humans as humans? It is Thomas Hobbes who develops a philosophy of humanity which eventually became one of the prototypes of modern human rights. Hobbes in his book *Leviathan or the Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* in 1651 –more well-known as *Leviathan*- presupposes a

³² See Mun'im A. Sirry, *Polemik Kitab Suci: Tafsir Reformis atas Kritik Al-Quran terhadap Agama Lain* (Jakarta: Gramedia Pustaka Utama 2013), xiii.

situation where humans live without law, authority and society. This condition is called *natura-state*. The situation will bring humans to conditions where people constantly either threaten or defend each other's lives. In this condition, humans really have full freedom to do anything just for the sake of keeping their lives or survival. It implies that humans actually have the nature to personally fulfil his needs, including the need for security.³³

What Hobbes conveys in this regard is actually a high appreciation for the life that becomes human nature. This is in no way contrary to one of the principles in Islam, *hifdz al-nafs*, which is to maintain and develop life as the goal of *shari'ah* revealed by God.

In the LGBT context, they are similar to what is discussed by Hobbes or included in the concept of *hifdz al-nafs*. They have the right to live and also develop their lives. Gender and sexual orientation minorities are still human beings created by God who have various rights. It is righteous for anyone to respect and protect those rights. At this point, it is increasingly clear that Islam and human rights both support humanity with protection of life and dignity.

Islam and all religions alike should support anyone, rather than being discriminatory against certain groups, in this case LGBT people. This is an effort to realize Islam which is *rahmah li al-'ālamīn*. That is Islam that provides peace and life for anyone. It is as God says in al-Anbiyā' verse 107, "And We sent thee but to (be) mercy for all creatures."

The above verse indicates that the Prophet Muhammad is sent to convey love to all creatures including anyone or anything. Thus, it is ironic that Muslims and followers of the Prophet even commit discriminatory (*dzalim*) or unfair acts against not only other creatures, but towards fellow humans. Kindness is more necessary than the attitude which fuels violence and injustice since it will only cause perpetual conflict between humans.

Conclusion

Different regulations, both at national and international level are established to protect human dignity for vulnerable groups including LGBT group. The Yogyakarta Principles are specific mechanisms for the protection of human rights for LGBT groups. Meanwhile, reconstructing classical understanding of Islamic Jurisprudence by taking *maqāsid* and a comprehensive understanding on LGBT minority-group issue regarding its humanitarian aspects and human dignity into consideration enables a

³³ See Bagong Suyanto, *Filsafat Sosial* (Yogyakarta: Aditya media Publishing, 2013), 97; 128.

more humane Islamic jurisprudence. With this approach, it can be argued that Islam and human rights can be brought in the perspective of harmony.

Why do different interpretations of God's law actually divide people who have different sexual orientations and gender identities? In the context of nation state, it is right for the state to view LGBT people as vulnerable group. Actually, as far as religion is concerned with LGBT people, they are still human beings who must be valued by upholding their dignity as human beings. Therefore, it is important to respect, protect and fulfil their human rights.[]

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