

Abu Hanifah's Legal Reasoning on Liwath: A Reflection on LGBT in Indonesia

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Article	Abstract
<p>How to cite: Muhammad Sabilal Alif & Abdul Wahab, 'Abu Hanifah's Legal Reasoning on Liwath: A Reflection on LGBT in Indonesia' (2024) Vol. 5 No. 2 Rechtenstudent Journal Sharia Faculty of KH Achmad Siddiq Jember State Islamic University.</p> <p>DOI: 10.35719/rch.v5i2.122</p> <p>Article History: Submitted: 18/06/2024 Reviewed: 25/06/2024 Revised: 04/07/2024 Accepted: 15/07/2024</p> <p>ISSN: 2723-0406 (printed) E-ISSN: 2775-5304 (online)</p>	<p>This research explores Imam Abu Hanifah's legal perspective on <i>liwath</i> (homosexual acts) and assesses its relevance to contemporary LGBT issues in Indonesia. Islam, as a religion of <i>rahmatan lil alamin</i>, clearly prohibits all forms of sexual deviation, with <i>liwath</i> being unanimously declared haram by Islamic scholars. However, there is <i>ikhtilaf</i> (difference of opinion) among scholars regarding the appropriate level of <i>uqubah</i> (punishment) for such acts. Imam Abu Hanifah holds that both the perpetrator and the recipient of <i>liwath</i> should be subjected to <i>ta'zir</i> punishment a discretionary penalty determined by the state or ruling authority rather than the fixed <i>hudud</i> penalties applied to <i>zina</i> (fornication). The study has two main objectives: (1) to explore Imam Abu Hanifah's opinion and legal method (<i>istinbath</i>) in determining the punishment for <i>liwath</i>; and (2) to examine the relevance of this opinion to Indonesia's context, especially in light of LGBT rights. Using a normative juridical approach through library research, the study finds that Imam Abu Hanifah based his opinion on <i>hadith</i> and reasoned legal interpretation, avoiding <i>qiyas</i> (analogy) with <i>zina</i> due to fundamental differences in the acts. The thesis concludes that while Imam Abu Hanifah's views are consistent within the framework of Islamic jurisprudence, their application in Indonesia today is limited. This is due to Indonesia's identity as a nation-state rather than a religious state, and its constitutional commitment to human rights, including protection for LGBT individuals. Thus, direct implementation of classical <i>ta'zir</i> sanctions would conflict with modern legal and human rights standards.</p> <p>Keywords: <i>Abu Hanifah, Liwath, LGBT.</i></p> <p>Abstrak Penelitian ini membahas pandangan hukum Imam Abu Hanifah mengenai <i>liwath</i> (hubungan seksual sesama jenis) serta relevansinya terhadap fenomena LGBT di Indonesia. Dalam Islam, <i>liwath</i> secara tegas dilarang dan dikategorikan sebagai perbuatan haram oleh mayoritas ulama. Namun demikian, terdapat perbedaan pendapat (<i>ikhtilaf</i>) di kalangan ulama mengenai jenis dan tingkat hukuman (<i>uqubah</i>) yang pantas diberikan kepada pelaku <i>liwath</i>. Imam Abu Hanifah berpendapat bahwa baik pelaku maupun objek <i>liwath</i> dikenakan hukuman <i>ta'zir</i>, yaitu hukuman yang tidak bersifat tetap dan dapat ditentukan oleh penguasa sesuai dengan kebijakan dan kebutuhan masyarakat. Pendekatan ini berbeda dari mayoritas ulama yang mengqiyaskan <i>liwath</i> dengan <i>zina</i> dan menetapkan hukuman <i>hudud</i> seperti cambuk atau rajam. Pandangan Imam Abu Hanifah ini didasarkan pada metode <i>istinbath</i> hukum yang menggunakan <i>hadis</i> Nabi dan penalaran rasional, tanpa menyamakan secara langsung antara <i>liwath</i> dan <i>zina</i> karena keduanya memiliki unsur dan dampak yang berbeda. Penelitian ini menggunakan pendekatan yuridis normatif dan metode studi pustaka. Temuannya menyimpulkan bahwa meskipun pandangan Imam Abu Hanifah relevan dalam konteks hukum</p>

Islam klasik, penerapannya di Indonesia memiliki keterbatasan. Hal ini disebabkan oleh status Indonesia sebagai negara bangsa yang berdasarkan hukum, bukan negara agama, serta komitmennya terhadap prinsip-prinsip hak asasi manusia, termasuk perlindungan terhadap kelompok LGBT. Oleh karena itu, penerapan langsung sanksi ta'zir terhadap pelaku liwath perlu disesuaikan dengan sistem hukum nasional dan nilai-nilai konstitusional.

Kata Kunci: *Abu Hanifah, Liwath, LGBT.*

Introduction

The feeling of love of men for the opposite sex is a gift given by the Creator as a sign of his power so that later it will create offspring. In terms of sexual relations, it is fitting for men to have relations with women, this aims to continue the regeneration of human civilization and maintain the human reproductive system itself. However, in today's life, especially in sexual activity, the distribution of sexual desire varies and is misunderstood by some people, so that a large number of people divert their biological desires to the same sex. This is called gender variance. Or maybe some people know each other better as LGBT. This creates anxiety in the midst of society who consider LGBT as a disgusting and immoral act. In fact, if we refer to the text of the Qur'an that Allah SWT instructs humans to live in pairs, not the other way around.¹ This is a form of disobedience to the Creator and violates human nature which should channel biological desires to the opposite sex but instead vents them to the same sex. In Islamic teachings, homosexual behavior is not permitted even though Islam recognizes human rights because the impacts caused by homosexual behavior are very significant for health and in the lives of society.²

In sexual relations, Islam has provided a form of humane sexual distribution through the institution of marriage. A legitimate marriage is a correct and legal sexual distribution, what is not correct is sexual distribution other than with the opposite sex.³ Therefore, we strongly agree that homosexuals deserve to be given heavy punishment because they have been offered an alternative through marriage, but instead they indulge their sexual desires inappropriately according to Islamic law.⁴

The distribution of LGBT in Indonesia itself is still uncertain because there are no standard statistics and not all LGBT people dare to be open about their identity.⁵ Based on the estimation of the Indonesian Ministry of Health in 2012 there were around 1,095,970 gays, both those who showed their existence and those who did not. More than 66,180 people or around 5% of the number of gays had HIV, whereas in 2009 the gay population was only around 800 thousand people.⁶ The growth in numbers is accompanied by the increasing number of organizations that want LGBT to be legalized in Indonesia. They are no longer ashamed of showing their existence in society. Various forms of efforts to introduce LGBT in

¹ Muh Tahir & Rostansar, *Analisis Hukum Sebab Perceraian karena Faktor Kekerasan dalam Rumah Tangga*, Legal, Vol. 1 No.1, 2022, 99.

² Fuadi Irawan, *Fenomena Pesta Gay Dalam Pandangan Hukum Pidana Islam*, Jurnal Legal Reasoning, Vol. 2, No. 2 (2020), 93

³ Muhammad Ihram Ramadhan, dkk, *Human Rights Protection in Interfaith Marriages: Comparative Study of Indonesia and Singapore*, Rechtenstudent Journal, Vol 4 No. 3, 2023, 239

⁴ Syafi'in Mansur. *Homoseksual dalam perspektif Agama-agama di Indonesia*, Jurnal Aqlania, Vol 08, No. 01, (2017), 37

⁵ Yudiyanto, *Fenomena Lesbian, Gay, Biseksual dan Transgender (LGBT) di Indonesia Serta Upaya Pencegahannya*, Nizham, Vol. 05, No. 01 Januari-Juni, (2016), 63

⁶ <https://www.google.co.id/amp/s/m.republika.co.id/amp/o1e9ut394> (Accessed on February 26, 2022)

Indonesia are through mass media and print media where they report that LGBT behavior is normal and common behavior.

Various opinions have emerged regarding the LGBT phenomenon, both pro and con. In Indonesia itself, homosexuality is still considered taboo by society and the government. In fact, LGBT has actually received legal status from the Ministry of Law and Human Rights since 2013. However, when LGBT people in Indonesia voice their rights, they often find it difficult to fight for their rights because they are considered to be destroying religion considering that in Indonesia religious norms and morality are highly respected, if they still insist on fighting for their rights on the basis of LGBT people, then people will not hesitate to hate, curse, and ostracize LGBT people. This phenomenon suggests that society does not accept LGBT behavior as part of being a citizen.⁷ Meanwhile, Prof. Mahfud MD in the ILC event organized by tvone explained that we have never rejected LGBT people, we must respect their basic rights in other matters, however, in terms of sexual deviant behavior, it is not allowed because there is already a constitutional basis for it.⁸

The prohibition on homosexuality between men and women in Indonesia is limited to minors and those who practice it. However, if homosexuality is consensual and the person doing it is an adult, then there is no prohibition on homosexuality. However, the stigma that exists in society does not want to accept such assumptions. Because homosexuality committed by people of the same sex is included in the category of abnormal acts, and in the *fiqh jinayah* paradigm, they deserve to be punished for doing it if proven guilty.⁹

In positive law, there is actually an article that can criminalize homosexual perpetrators, specifically in Article 292 of the Criminal Code, which carries a criminal sentence of 5 years in prison for perpetrators of homosexual crimes, in addition to that, perpetrators of homosexual crimes can be sentenced to a longer sentence of 7 years if the perpetrator of the obscene act is a certain person as stated in Article 294 of the Criminal Code.¹⁰

The basis for consideration in Article 292 of the Criminal Code was made by the legislators solely to provide a sense of security and protect the interests of minors so that they do not become victims of homosexual acts which will later become a scourge for the victims and their health will be disturbed, especially from a psychological perspective.¹¹ Furthermore, in the 2023 Criminal Code which is currently being drafted by the government, there is an article where the government can later criminalize homosexual perpetrators whose victims are of all ages, provided that it is carried out with violence as stated in Article 420 paragraph 1b which reads "anyone who commits an indecent act against another person of a different or the same sex: b. by force with violence or threat of violence shall be punished with a maximum imprisonment of 9 years".¹² This is certainly a breath of fresh air for some people who want homosexuals to be punished because homosexual behavior does not reflect the moral identity of the nation, Eastern culture and is contrary to the first principle of Pancasila, which should

⁷ M. Tahta Ainir Rohman, "Analisis Pendapat Imam Nawawi al-Bantani Tentang Hukuman Bagi Pelaku Liwath dan Relevansinya dengan Fenomena LGBT di Indonesia", (Skripsi, UIN Walisongo, 2020), 26

⁸ <https://www.tribunnews.com/amp/2018/01/24/cerdasnya-jawaban-mahfud-md-patahkan-argumen-lgbt-harus-diterima-karena-ciptaan-tuhan> (Accessed on February 27, 2022)

⁹ Neng Djubaeda, *Perzinaan Dalam Peraturan Perundang-Undangan Di Indonesia Di Tinjau dari Hukum Islam*, Cet. 1, (Jakarta: Kencana, 2010), 263

¹⁰ R. Soesilo, *KUHP Serta Komentar-Komentar Lengkap Pasal Demi Pasal*, (Bogor: Politeia, 1993), 213

¹¹ Wirjono Prodjodikoro, *Tindak-tindak Pidana Tertentu di Indonesia*, (Bandung: PT. Refika Aditama, 2003), 120

¹² <https://news.detik.com/berita/d-4708616/disahkan-pekan-depan-begini-nasib-lgbt-di-ruu-kuhp> (Accessed on February 27, 2022)

be accompanied by religious values in formulating laws so that in the future it will reach a point of benefit.

In Islamic law, *liwath* is defined as the sexual activity of men with men which is attributed to the people of Prophet Luth who were disobedient and had committed such a heinous act. The people lived in the land of Sodom which we now know as Jordan and according to western nations this act is called sodomy.¹³ As stated in the Qur'an, Surah Al A'raf, verses 80-83:

شَهْوَةَ الرِّجَالِ لَتَأْتُونَ إِيَّكُمْ. الْعَلَمِينَ مِنْ أَحَدٍ مِنْ بِهَا سَبَقَكُمْ مَا الْفَاحِشَةَ أَتَأْتُونَ لِقَوْمَةٍ قَالَ إِذْ وَلَوْطًا
أَنَاسٍ إِنَّهُمْ قَرَيْتَكُمْ مِنْ أَخْرَجُوهُمْ قَالُوا أَنْ إِلَّا قَوْمَةٍ جَوَابَ كَانَ وَمَا مُسْرِفُونَ قَوْمٌ بَلِ الْنِسَاءِ دُونَ مَنْ
الْغَيْرِينَ مِنْ كَانَتْ أَمْرَاتِهِ إِلَّا وَأَهْلَهُ فَانْجَيْنَاهُ. يَتَطَهَّرُونَ.

Meaning: And we have also sent Lot to his people, remember when he said to them "why are you doing these fahisyah deeds, which no one in this world has ever done before you? "In fact you are going to men to release your lust for them, not for women, in fact you are a people who transgress. Then we saved Lot and his followers except his wife, she was among those who were destroyed. (Al A'raf verses 80-83).¹⁴

Based on the above evidence, it is explicitly explained that the Prophet Luth not only carried out the teachings of monotheism that had been carried out by previous prophets but also paid serious attention to the people of Sodom who practiced homosexuality so that they would not carry out this behavior because it was included in the category of immoral acts which had a very severe punishment if they were caught doing it.

In maintaining the continuity of human offspring, Islam as a religion that is *rahmatan lil alamin* forbids adultery, LGBT and other inhumane sexual deviations and Islam requires perpetrators to be punished according to what they have done. This is solely to maintain purity and also to maintain lineage. The scholars agree that these acts are forbidden and can have a negative impact on society. However, among the scholars there is a difference of opinion in determining the level of *uqubah* for homosexual perpetrators because in using the *istinbath* method the scholars use their respective methods. The differences of opinion are divided into 3 in imposing punishment for homosexual perpetrators, including:¹⁵ killed, charged with *zina* and *ta'zir*.

From the explanation above, that since the previous prophets, especially during the time of the prophet Luth until the companions, the perpetrators and objects have been subject to sanctions by being killed, but the scholars still disagree about determining the level of punishment. Furthermore, Imam Abu Hanifah is very tolerant of homosexual perpetrators with *ta'zir* punishment so it is very interesting to study considering that Imam Abu Hanifah is a scholar who prioritizes using reason and rationality and *wara'*. So here the researcher is very interested in analyzing the arguments of Imam Abu Hanifah because there are different punishments, so it is worth reviewing the imposition of sanctions for homosexual perpetrators because seeing the reactions caused by these actions are very bad for the survival of individuals and society in general.

Research Method

¹³ Abd. Aziz Dahlan, *Ensiklopedia Hukum Islam*, Jilid III, (Jakarta: PT. Ikhtiar Van Houve, 1996), 563

¹⁴ Departemen Agama RI, *Mushaf Al-Qur'an Terjemah*, (Jakarta: Al-Huda, 2002), 87

¹⁵ Sayyid Sabiq, *Fiqhus Sunnah*, Jilid 2, (t.tp: Dar al Kitab al-Islamy Dar al hadist, t.t), 366-367

The research method itself usually contains a description of the various research methods chosen. Doing something to get satisfactory results is a form of research method function so that the research is more systematic and neatly arranged.¹⁶ In this study, the type of research used is library research. Library research itself means research in which the type of research uses books or literature as a source of reference data.¹⁷ In this case, using books related to the opinion of Imam Abu Hanifah regarding homosexual punishment and positive criminal law books. In this study, a normative legal approach was used, which is a study in which the approach is through legislation and court decisions and legal norms that occur in the community.¹⁸

In this study, the data collection technique uses literature study. The literature study itself was carried out in order to select a theoretical basis in the form of opinions of Islamic legal experts that are relevant to the title of the proposal to obtain information about the punishment for perpetrators of liwath both in the form of data through official manuscripts.¹⁹

In this study, the data analysis technique uses the descriptive analysis method. The descriptive analysis method means describing and providing interpretations of what exists and the existing opinions and processes that are ongoing or have developed.²⁰ This method is used to analyze and describe Imam Abu Hanifah's thoughts on the punishment of liwath.

Data validity checking is very important so that the research produced can be accounted for and trusted through data verification, in this case the researcher uses triangulation techniques, namely data validity checking techniques that utilize something other than the data for checking purposes or as a data comparison. Because this research is library research, the author obtains data from written documents or books which then provide different views on the phenomena being studied.²¹

Results and Discussion

Legal Reasoning of Imam Abu Hanifah on Liwath Punishment and Its Derivation

From the regulations in the Civil Code, it can be concluded that there are two types of guarantees, namely general guarantees and special guarantees. The general guarantee is born from the law, without the agreement held by the parties first, the creditors jointly obtain the general guarantee provided by the law. In this general guarantee, all the debtor's belongings are automatically collateral for creditors regardless of who first made the principal agreement. All creditors have the same rights to the object of the guarantee, but the payment of the debt is not divided equally from the proceeds of the sale of the goods. Meanwhile, special guarantees are only for certain creditors and the collateral is specifically designated, namely in the form of Pawns, Fiduciries, Dependent Rights, and Bank Guarantees.²² Special guarantees are born because of the existence of special agreements made by creditors and debtors which can be in the form of material guarantees or individual guarantees.

¹⁶ Muhammad Danial, *"Relasi Agama Dan Negara (Studi Komparasi Pemikiran Nurcholish Madjid dan Abdurrahman Wahid)"*, (Skripsi, IAIN Jember, 2021), 73

¹⁷ Mestika Zed, *Metode Penelitian Kepustakaan*, (Jakarta: Yayasan Obor Indonesia, 2004), 1-2

¹⁸ Zainuddin Ali, *Metode Penelitian Hukum*, Ed. 1, Cet. 11, (Jakarta: Sinar Grafika, 2019), 105

¹⁹ Zainuddin Ali, *Metode Penelitian Hukum...*, 107

²⁰ Zainuddin Ali, *Metode Penelitian Hukum...*, 107

²¹ M. Djamal, *Paradigma Penelitian Kualitatif*, (Yogyakarta: Pustaka Pelajar, 2015), 93

²² Triamita Rahmawati, "Dependent Rights as a Guarantee of Legal Protection for Parties in Financing in Sharia Banking," *Notarium Officium Journal* 1, no. 2 (August 1, 2021): 380–92, <https://doi.org/10.20885/JON.vol1.iss2.art18>.

According to Imam Abu Hanifah, homosexual practices are included in the category of criminal acts (jarimah) as explained in QS. Al-Ankabut verse 28.²³ However, the determination of the punishment for perpetrators of homosexual crimes is sufficient to be subject to ta'zir based on the argument of Imam Abu Hanifah.²⁴ This is in contrast to the opinions of the imams of other schools of thought who judge homosexuals to be subject to stoning, whether married or not, such as: Imam Malik, Imam Syafi'i and Imam Hambali.

Imam Abu Hanifah and his students view zina and liwath differently in terms of their definitions, if liwath is a sexual activity carried out by a man by inserting his genitals into another man through the anus, while zina is sexual intercourse carried out by a pair of men and women without a marriage contract.²⁵ Thus, the difference in name also indicates a different meaning. If homosexuality is included in the category of zina, there should be no difference of opinion among the companions in determining this punishment. Thus, liwath is sufficiently punished as ta'zir. This opinion is followed by Imam Syafi'i in another narration, Mu'ayyab Billah, Imam Al-Murtadha and the scholars of Zahiriyyah.²⁶

The basis for determining ta'zir is based on the hadith of the Prophet SAW which reads:

ولعن الله من عمل قوم لوط قلها ثلاثا في عمل قوم لوط

Meaning: Allah SWT curses anyone who commits acts like the people of Prophet Lut, (Rasulullah three times). (HR. Nasa'i)²⁷

Based on the hadith, the term "curse" has an unclear percentage and is not determined by sharia, while the literal curse still has multiple interpretations, it can be in the form of an epidemic, punishment in this world or in the hereafter by Allah SWT.

Several reasons put forward by Islamic jurisprudence experts view that homosexual practices are sufficiently punished with ta'zir, not had zina, because zina is more dangerous and can produce children and damage lineage, while homosexuality cannot produce children and does not damage lineage. Referring to this argument, Islamic jurisprudence experts assume that the act of liwath is only given a punishment left to the ulil amri. However, Imam Abu Hanifah and the Hanafi scholars emphasized that the determination of ta'zir against homosexual perpetrators is solely based on the method of exploring the legal basis carried out by Imam Abu Hanifah.²⁸ This is done because it is difficult to find a firm and detailed punishment for homosexual perpetrators in the texts of the Qur'an and Hadith, besides that, comparing the punishment received for homosexual perpetrators with the hadd of zina is not appropriate, considering that the punishment of Allah that arose for the people of Prophet Luth was not only due to the crime of homosexuality but also their disbelief in Allah SWT.²⁹

²³ Munawar Chalil, *Biografi Empat Serangkai Imam Mazhab*, (Jakarta: Bulan Bintang, 1995), 353

²⁴ Imam Alauddin Abi Bakr Bin Mas'ud al Kasani, *Bada' al Shanai fi Tartib al Syara'i*, Juz 7, (Beirut: Lebanon, 1997), 184.

²⁵ A. Hanafi, *Hukum Pidana Islam*, (Jakarta: Bulan Bintang, 1990), 20

²⁶ A. Hanafi, *Hukum Pidana Islam...*, 15

²⁷ Abu Abdurrahman Ahmad bin Syu'aib bin Ali Al Khurohani An Nasai, *As-Sunan Al Kubro*, Juz 4, (Beirut: Massasah Ar Risalah, 2001), 856. Lihat Juga <http://marhalahsebelas.blogspot.com/2015/10/hati-hati-syubhat-lgbt.html?m=1> (Accessed on February 27, 2022)

²⁸ Rukiah Ali & Nukman, *Hukuman Terhadap Pelaku Homoseks*, Legitimasi, Vol. VI No. 2 Juli-Desember 2017, 264-265

²⁹ Didi Sumardi & Wawan Kurniawan, *Sanksi Pelaku Jarimah Homoseks menurut Anas Ibn Malik*, Varia Hukum, Vol. 1, No.1, 2019, 8-9.

In the method used by Imam Abu Hanifah in determining the uqubah for homosexual perpetrators, namely by using a rational approach as the basis, this is due to there being no explicit provisions in discussing the uqubah for homosexual perpetrators in the shar'i texts.

Imam Hanafi's words were based on his thoughts, namely:

من وطئ اجنبية فيما دون الفرج يعزر لأنه منكر ليس له شيء مقدر ومن أتى امرأة في المواد
ضع المكروه أو عمل قوم لوط فلا حد عليه عند أبي حنيفة ويعزر

This means: a person who has intercourse with a woman other than his wife in something other than the vagina is given a ta'zir punishment, whereas people who have intercourse with women in a place that is considered disliked or who do the actions of the people of Luth, according to Imam Abu Hanifah, such people are not given hadd but rather a ta'zir punishment.³⁰

Imam Abu Hanifah, as quoted in the book entitled *fiqh wal adilatuhu* by Wahbah Zuhaili, is of the opinion that a person who engages in sexual activity with someone of the same sex is punished with ta'zir, as was done by the followers of Prophet Lut. Considering the dangers posed by homosexuals not being able to produce offspring and the mixing of lineages and liwath itself is not included in the classification of adultery.³¹

Imam Abu Hanifah as quoted in the book entitled *Fiqh of the Four Schools of Thought* by Abdurrahman Al-Juzairi, he is of the opinion that there is no had for perpetrators of homosexual crimes, but it is sufficient to be sentenced to ta'zir based on the rules agreed upon by ulil amri to provide a deterrent effect for perpetrators of homosexual crimes. It can also be sentenced to death by sword but the punishment is still ta'zir not had, if the homosexual act is repeated by the perpetrator of the crime. This is intended because there is no clear text discussing the determination of punishment for perpetrators of homosexuality.³²

Imam Abu Hanifah as quoted in the book of *Fiqh Sunnah* written by Sayyid Sabiq, he is of the opinion that the one who has the right to impose a punishment for the perpetrator of liwath is the ruler, because he is of the view that the act of liwath does not fall into the qualification of adultery so that the sanctions are left to the ruler, and the sanctions given to the perpetrator of the crime of liwaht cannot be likened to the hadd of adultery.³³

Looking at the explanation above, in the author's opinion, he agrees with what has been put forward by Imam Abu Hanifah regarding the perpetrators of the crime of liwath being given ta'zir sanctions whose execution procedures are fully submitted by ulil amri, not had zina and agrees on the prohibition of homosexual acts. This aims solely so that homosexual perpetrators can repent with the opportunity that has been given and if for example the perpetrator acts with the same crime, then it can be ta'zir with the death penalty on the orders of ulil amri, so that later it can be a lesson for ordinary people not to approach such acts.

Homosexual acts are acts that are not actually done by a person who is honorable because looking at the negative side, there are so many that Islam strictly forbids such acts.

³⁰ Ibnu al-Humam, *Syarah Fathu al-Qadir*, (Beirut, Lebanon: Darul Fikr, 1977), 262. Also look in Rukiah Ali & Nukman, *Hukuman Terhadap Pelaku...*, 264

³¹ Wahbah Az-Zuhaili, *Fiqh Wal Adilatuhu Jilid 7*, Cet 1, (Jakarta: Gema Insani, 2011), 343

³² Abdurrahman Al-Juzairi, *Fikih Empat Mazhab*, Cet 2, (Jakarta: Pustaka Al-Kausar, 2017), 239

³³ Sayyid Sabiq, *Fikih Sunnah 4*, Cet 5, (Jakarta: Cakrawala Publishing, 2015), 276

The wisdom of the prohibition of liwath acts also provides an affirmation that men must be in line with the nature that has been given by the creator, namely as a wearer of clothes and his clothes are his own partner.³⁴ In this context, it is very different from what the perpetrator of the crime of liwath did because it is contrary to moral and religious norms.

Based on the opinion that has been put forward by Imam Abu Hanifah, here the author tries to analyze the purpose of giving uqubah. The purpose of giving uqubah is as follows:

1. The purpose of the first uqubah is as a means to maintain order in society. As stated by Imam Abu Hanifah, namely that perpetrators of homosexual crimes are only subject to ta'zir law, the implementation of which is entirely left to the ulil amri.³⁵ In the author's opinion, the opinion expressed by him regarding the determination of punishment for homosexual perpetrators is in accordance with the purpose of providing the first uqubah, namely, as a means to maintain order in society because by providing uqubah for perpetrators of homosexual crimes, it can minimize other people from committing acts as were carried out by the people of Prophet Luth, therefore it can maintain order in society.
2. The purpose of providing the second uqubah is as a deterrent and prevention, especially for perpetrators of homosexual crimes, through the implementation of providing uqubah for perpetrators of homosexual crimes as stated by Imam Abu Hanifah, it is appropriate, namely that people who engage in homosexual sexual activities as was done by the residents of Sodom, a sanction is applied so that it is hoped that the sanction or punishment can minimize similar acts.³⁶
3. The third purpose of giving uqubah is as an effort to educate and teach. By implementing uqubah for perpetrators of homosexual crimes as stated by Imam Abu Hanifah, at least it can be used as a lesson and education for others about how painful the torture is for perpetrators of homosexuality so that it is hoped that others will not approach similar acts.³⁷
4. The purpose of giving the fourth uqubah is as an effort to repay the actions that have been carried out by homosexuals as stated by Imam Abu Hanifah, namely that in punishing homosexuals, only ta'zir law is imposed, the implementation procedures of which are completely left to the ulil amri, in this case according to the author it is appropriate and correct because homosexual behavior is included in the category of immoral behavior and is included in despicable acts and deserves ta'zir punishment.

Imam Abu Hanifah's Perspective on Liwath and Its Relevance to LGBT in Indonesia

The legality of homosexuality still does not exist in Indonesia. In the law governing marriage, marriage is considered valid and recognized by positive Indonesian law if it is carried out by a man to the opposite sex. If it is carried out by a homosexual to the same sex, it is considered invalid and unconstitutional. In the Draft Criminal Code there is an Article on

³⁴ Syekh Ali Ahmad Jurjawi, *Indahnya Syariat Islam*, (Terj: Faisal Shaleh, dkk), Cet. I, (Jakarta: Gema Insani, 2006), 599

³⁵ Hamdan Arief Hanif & Indah Listyorini, *LGBT dalam Perspektif Hukum Keluarga Islam*, Abhats, Vol. 5 No.2, 2024, 22

³⁶ Rahma Sholihin & Zubaidi, *Kriminalisasi Homoseksual sebagai Tindak Pidana: Studi Determinasi Moral sebagai Hukum Pidana*, Tasyri', Vol. 2 No.1, 87.

³⁷ Arif Maftuhin, *Adakah Ruang Ijtihad untuk Isu Homoseks?* Musawa, Vol. 2 No.1, 2003, 29-40.

the prohibition of homosexual acts or *liwath*, specifically in Article 420 which will later classify homosexuality as a criminal act.³⁸ So far, the prohibition on homosexuality in the provisions of Article 292 of the Criminal Code has only been limited to victims who are suspected of being children. If homosexual acts are carried out by people who are also adults, then the provisions of Article 292 of the Criminal Code cannot be criminalized.

In article 292 of the Criminal Code on indecency, it is categorized that an adult who commits indecency against a minor, who has the same gender as him, even though he knows that the child is suspected or should be suspected of being a minor, is prosecuted with a prison sentence of five years. However, homosexual perpetrators can be punished more severely if they are committed by certain people, such as parents, uncles and stepfathers, then they are threatened with a heavier sentence of 7 years in prison based on article 294.³⁹

In the author's opinion, regarding the article above, that homosexual practices (*liwath*) are included in the classification of obscene acts so that they are subject to a criminal sentence of 5 years in prison. In the article, what is noted is that the victim must be a child who is not yet an adult or is thought to be not yet an adult who has the same gender and is not yet legally competent. If the perpetrator is a certain person, namely, parents, uncles and stepfathers, then the criminal threat imposed is heavier for 7 years in prison.

Based on the description above, researchers can draw conclusions regarding the similarities and differences between *liwath* in positive law and Islamic jurisprudence according to the opinion of Imam Abu Hanifah:

1. *Liwath* in positive law, specifically in the old Criminal Code, is a sexual activity carried out by someone of the same sex. Meanwhile, Imam Abu Hanifah is of the opinion that *liwath* is the activity of inserting the genitals into the anus of another man.⁴⁰
2. *Liwath* in the positive law of the Criminal Code, the perpetrators who are punished are adults who fulfill the elements of indecent acts against children. Meanwhile, perpetrators of homosexual crimes are given *ta'zir* punishment, but can be sentenced to death if the perpetrator of *liwath* repeats the act with the approval of *ulil amri* based on the opinion of Imam Abu Hanifah.
3. *Liwath* in positive law and Islamic jurisprudence is included in the category of immoral behavior and there are provisions for criminal penalties.
4. Perpetrators of homosexual crimes in Islamic jurisprudence and Indonesian criminal law are both held criminally responsible for the actions they have committed.
5. *Liwath* in the positive law of the Criminal Code which is the object is not held criminally responsible because it is still a child. While in Islamic criminal law the object is only punished *ta'zir* based on the argument of Imam Abu Hanifah.

From the similarities and differences of the above-described *liwath* regarding Imam Abu Hanifah's opinion with the positive law in Indonesia, the researcher argues that the opinion put forward by Imam Abu Hanifah regarding the percentage of *uqubah* against homosexual criminals, if actualized in Indonesia, is less appropriate and less relevant considering that Indonesia is a religious country, not an Islamic country, even though Indonesia is also the country with the largest Muslim population, then the opinion of Imam

³⁸ Siska Lis Sulitiani, *Kejahatan dan Penyimpangan Seksual: Dalam Prespektif Hukum Islam dan Hukum Positif di Indonesia*, Cet. 1, (Bandung: Nuansa Aulia, 2016), 49

³⁹ R. Soesilo, *KUHP Serta Komentar-Komentari Lengkap Pasal Demi Pasal*, (Bogor: Politeia, 1993), 213

⁴⁰ Zaiyad Raumizah & Azmil, *Penjatuhan Hukuman bagi Pelaku Liwath dalam Putusan Hakim Mahkamah Syar'iyah*, Tasyri', Vol. 3 No. 2, 299-322.

Abu Hanifah cannot be forced considering that LGBT is an act guaranteed by human rights for each individual citizen. Imam Abu Hanifah's opinion equates the perpetrator and the object of ta'zir punishment, where the procedure for its implementation is completely left to the ulil amri.

Conclusion

First, Regarding the practice of liwath, Imam Abu Hanifah agreed on its prohibition so that in determining the percentage of uqubah for liwath (homosexual) perpetrators, he did not sentence homosexual perpetrators with had zina but only with ta'zir, because the danger caused by zina is greater than the act of liwath, zina can produce offspring while liwath does not produce offspring. Imam Abu Hanifah views that homosexual behavior is a sinful act for which in the text of the shari'a there is no clear provision regarding the punishment for homosexual perpetrators so Imam Abu Hanifah sentenced it with ta'zir, if in the text of the shari'a there were clear provisions regarding the uqubah of homosexual perpetrators then the companions and the fuqaha would not have had any disagreement in their opinions about punishing this matter.

Second, that related to the argument of Imam Abu Hanifah regarding the uqubah for homosexuals, if it is actualized in Indonesia it is very irrelevant considering that Indonesia is a religious country, not an Islamic country where the punishment is based on Islamic criminal law. Human rights guarantee LGBT acts because it is included in the rights of each individual citizen. Imam Abu Hanifah's argument also likens the perpetrator and object to ta'zir punishment where the implementation procedure is completely left to the ulil amri. According to the author, in agreement with Imam Abu Hanifah where the perpetrator and object are punished ta'zir, this is intended to provide an opportunity for homosexuals to repent and if the person concerned repeats it again, it can be ta'zir with the death penalty on the orders of the ulil amri, so that later it can be a lesson for ordinary people not to approach such acts.

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