Indonesian Journal of Islamic Law

ISSN (Online) 2615-7543, ISSN (Print) 3089-5839
Vol. 8, No. 2, 2025, pp. 256–277
https://doi.org/10.35719/jrbvhk28
https://ijil.uinkhas.ac.id/index.php/IJIL

OPEN ACCESS

# Normative Divergence on Consensual Homosexuality: A Comparative Study of Islamic Criminal Law and Indonesian Positive Law

**M. Nurul Irfan[1*], Laila Palupi Rahmadani[2], Maskur Rosyid[3], Harapandi Dahri[4], Shalini Urteaga-Crovetto[5]**

[1]UIN Syarif Hidayatullah Jakarta, Jakarta, Indonesia
[2]Ditjen Bimas Islam - Kementerian Agama RI, Jakarta, Indonesia
[3]UIN Walisongo Semarang, Semarang, Indonesia
[4]Kolej Universiti Perguruan Ugama Seri Begawan, Bandar Seri Begawan, Brunei Darussalam
[5]Heidelberg University, Heidelberg, Germany
*Corresponding email: nurul.irfan@uinjkt.ac.id

| Received: 15-09-2025 | Revised: 06-11-2025, 10-12-2025 | Accepted: 15-12-2025 |
|---|---|---|

## Abstract

The criminalisation of *liwāṭ* in Islamic criminal law is grounded in a robust normative framework. However, it contains a dialectic between the determination of *ḥudūd* and the discretion of *taʿzīr*, with the principle that *darʾ al-ḥudūd bi al-shubuhāt* prevents criminalisation when there is doubt. In contrast, Indonesian positive law explicitly does not criminalise consensual same-sex relations between adults because the principle of legality requires the formulation of a written, clear, and definite criminal offence. This absence of norms is not a legislative omission but rather a policy choice that creates legal ambiguity as a control mechanism, achieved indirectly through other legal regimes. This study employs a normative and comparative juridical approach, focusing on the textual interpretation of Islamic criminal law and national statutory provisions. The results show that the tension between the certainty of criminalisation in Islamic criminal law and the ambiguity of Indonesian positive law illustrates two different models of social control: cautious normative certainty versus managed normative absence. The primary contribution of this research is to offer a new conceptual framework by repositioning the "legal vacuum" not simply as the absence of criminal norms at the

national level, but as a government strategy based on legal ambiguity in responding to the prescriptive nature of Sharia norms. Based on this analysis, the precautionary principle of sentencing in Islamic criminal law has the potential to serve as a basis for harmonisation that aligns with the principles of legality and human rights protection in the national legal system, thereby opening up space for reconciliation between Islamic moral norms and the constitutionality of law in Indonesia.

[*Kriminalisasi liwāṭ dalam hukum pidana Islam didasarkan pada kerangka normatif yang kuat. Namun, hal itu mengandung dialektika antara penentuan ḥudūd dan kebijaksanaan taʿzīr, dengan prinsip darʾ al-ḥudūd bi al-shubuhāt yang mencegah kriminalisasi ketika ada keraguan. Sebaliknya, hukum positif Indonesia secara sadar tidak mengkriminalisasi hubungan sesama jenis yang dilakukan atas dasar persetujuan antara orang dewasa karena prinsip legalitas mensyaratkan perumusan tindak pidana tertulis, jelas, dan pasti. Ketiadaan norma ini bukanlah kelalaian legislatif, melainkan pilihan kebijakan yang menciptakan ambiguitas hukum sebagai mekanisme kontrol, yang dicapai secara tidak langsung melalui rezim hukum lainnya. Studi ini menggunakan pendekatan yuridis normatif dan komparatif, yang berfokus pada interpretasi tekstual hukum pidana Islam dan ketentuan undang-undang nasional. Hasil penelitian menunjukkan bahwa ketegangan antara kepastian kriminalisasi dalam hukum pidana Islam dan ambiguitas dalam hukum positif Indonesia menggambarkan dua model kontrol sosial yang berbeda: kepastian normatif yang hati-hati versus ketiadaan normatif yang terkelola. Kontribusi utama penelitian ini adalah menawarkan kerangka konseptual baru dengan memposisikan ulang "kekosongan hukum" bukan hanya sebagai ketiadaan norma pidana di tingkat nasional, tetapi sebagai strategi pemerintah yang didasarkan pada ambiguitas hukum dalam menanggapi preskriptivitas norma syariah. Berdasarkan analisis ini, prinsip kehati-hatian dalam penjatuhan hukuman dalam hukum pidana Islam berpotensi menjadi dasar harmonisasi yang selaras dengan prinsip legalitas dan perlindungan hak asasi manusia dalam sistem hukum nasional, sehingga membuka ruang bagi rekonsiliasi antara norma moral Islam dan konstitusionalitas hukum di Indonesia*.]

**Keywords**: Legal Vacuum; *Liwāṭ*; Principle of Legality; Islamic Criminal Law; Indonesian Criminal Law

## Introduction

Homosexuality in Indonesia occupies a problematic position within the legal realm. On the one hand, discourses of democracy, human rights, and globalisation encourage recognition of diverse sexual orientations. However, on the other hand, conservative religious, cultural, and public moral norms position homosexuality as deviant behaviour. The convergence of these two currents creates an unclear legal approach, where demands for protecting individual freedoms clash with aspirations to uphold societal morality (Badgett et al. 2019; Thajib 2017). Thus, the issue of homosexuality is not only a social issue but also raises fundamental questions about the limits of criminal law intervention.

From an Islamic perspective, homosexual practices (*liwāṭ*) are expressly prohibited and considered a *jarīmah* (reprehensible act). (Joeha et al. 2025) This prohibition is based on the story of the people of Prophet *Lūṭ* in the Qur'an, specifically Surah *al-'Ankabūt* [29]: 28. The majority of classical scholars consider this act a grave sin that carries severe consequences. *Al-Shāfi'ī*, for example, equates it with adultery, which is punishable by death, as also affirmed by *Qāsim ibn Ibrāhīm, Abū Yūsuf, and Muḥammad ibn Ḥasan al-Shaybānī* from the *Ḥanafiyyah* school ('Awdah, n.d., vol. II: 352). Nevertheless, the level of punishment and the mechanism of its application remain a matter of debate in Islamic jurisprudence, giving rise to diverse views on the position of *liwāṭ* within the legal framework. (Omar 2012). This diversity then makes it difficult to adopt it directly in the pluralistic national legal system. Furthermore, Zaharin's reading of the revisions demonstrates that Islamic law is always dynamic and subject to reinterpretation in response to the needs of the times (Zaharin 2022).

Under Indonesian positive law, consensual same-sex relations between adults are not explicitly criminalised in the Criminal Code. The Constitutional Court's 2017 ruling on a judicial review filed by AILA affirmed the principle of legality, which states that there can be no criminalisation without a written legal basis (Ramadhan 2023). Despite intense pressure from conservative groups to expand criminalisation, the Constitutional Court maintained the limitation that the moral realm does not automatically become a criminal realm.

The formulation of the 2022 Criminal Code adds relevance to this discourse. Butt notes that although the new provisions regarding adultery and cohabitation are expanded, there is no formulation specifically criminalising homosexuality, especially if it is committed with consent by adults. In practice, law enforcement officials often use the Pornography Law as a basis for

criminalisation (Butt 2023). However, its use is extensive and not doctrinally aimed at targeting sexual orientation.

As an exception in the national context, Aceh explicitly criminalises homosexuality through the *Qanun Jinayat* (Islamic Law on the Criminal Code). Feener explains that the implementation of Sharia law in Aceh serves not only as a religious norm but also as an instrument of social engineering and *da'wah* (Islamic outreach) (Feener 2013). This *Qanun* fills a gap at the national level and demonstrates the asymmetry of criminal policy within a unitary state.

Socio-political dimensions also reinforce this legal dynamic. A wave of anti-LGBT moral panic in 2016 increased public pressure for the state to take criminal action (Rodríguez and Murtagh 2022). Queer representation in popular media is also limited, reinforcing the marginalisation of LGBT groups in the public sphere (Murtagh 2022). At the same time, the LGBT Muslim community continues to seek ways to reconcile faith, family, and the state within a stressful social space (Thajib 2017; Garcia Rodriguez 2024). These social factors demonstrate that legal silence does not imply an absence of control but rather the operation of regulatory mechanisms outside the criminal realm.

Previous studies have shown that the debate on homosexuality in Indonesia revolves around three domains: theological, positive law, and sociological. However, there has been no comprehensive analysis specifically comparing the absence of criminal sanctions for consensual homosexuality under Islamic law and Indonesian positive law and its implications for the principle of legality and the direction of national criminal law reform. This article argues that the absence of explicit criminalisation is not simply a "legal vacuum", but rather the result of a deliberate distinction between the moral and legal realms within the Indonesian legal system. It is where this research lies.

## Method

This research employs a normative legal approach (doctrinal legal research) that examines written legal norms in Islamic law and Indonesian positive law. This approach was chosen because the research question is epistemic, namely, whether an act can be punished in the absence of a clear norm regulating it. Thus, the research focus is not directed at opinion or social reality but rather on the normative construction of *jarīmah* in Islamic law and the principle of legality in the national legal system. Through this approach, the research can test the

legitimacy of criminalisation and the logical consequences of the existence or absence of norms.

The legal materials used include the Quran, Hadith, classical Islamic jurisprudence works, the Criminal Code, the Aceh *Qanun Jinayat*, Constitutional Court decisions, academic literature, and other legal reference sources. The analysis is conducted using a normative comparative method to highlight points of difference and overlap between the two legal systems and to assess how the principle of legality operates when confronted with demands of public morality. The findings are deductive, as they are derived directly from the authority of the norms analysed, rather than from empirical data.

## The Concept of *Liwāṭ* in Islamic Criminal Law

The discussion of *liwāṭ* in Islamic criminal law has long roots in classical Islamic jurisprudence. Generally, *liwāṭ* is understood as a sexual act between men expressly prohibited in the Qur'an and *Ḥadīth*. The story of the people of Prophet *Lūṭ* is positioned as the primary normative basis for this prohibition, where *liwāṭ* is viewed as a *fāḥishah*—a moral crime never before committed by the community (Qur'an, 29:28). Therefore, the majority of scholars consider *liwāṭ* not only a major sin but also a *jarīmah* deserving of legal sanctions (‘Awdah, n.d., vol. II: 352; Harahap 2016).

However, this prohibition did not arise in a vacuum. The construction of *fāḥishah* is also related to the social context of pre-Islamic Arabia, where sexual behaviour deemed to violate honour (*'irḍ*) carried social and legal consequences. Thus, the categorisation of *liwāṭ* as a crime is not solely based on textual evidence but also related to the moral values and social structure of society at the time.

The majority of schools of thought—the *Mālikī*, *Shāfi'ī*, and *Ḥanbalī*—classify *liwāṭ* as a crime equated with *zinā*. Consequently, married perpetrators are subject to stoning, while unmarried perpetrators are subject to flogging. Al-*Shāfi'ī's* view asserts that consent between the perpetrators does not diminish the criminal nature of *liwāṭ*, as it remains an *fāḥishah* act that undermines public morality. Even *Qāsim Ibn Ibrāhīm* believes the death penalty can be imposed regardless of marital status (Wahyuni 2018).

On the other hand, there are fundamental differences in the methodology of legal *istinbāṭ* (*uṣūliyyah*), which makes the position of *liwāṭ* inconsistent in *fiqh*. The *Ḥanafī* School rejects the direct similarity (*qiyās*) between *liwāṭ* and *zinā* because the objects and forms of the acts are different. Therefore, *liwāṭ* is not

categorised as *ḥudūd* but rather as *taʿzīr*—a punishment whose form and degree are left to the authority of the judge for the sake of public welfare (Rehman and Polymenopoulou 2013; Zaharin 2022). Here, it appears that the differences of opinion are not solely textual but also rooted in methods of legal reasoning such as the application of *qiyās*, *istiḥsān*, and consideration of *maṣlaḥah*. A similar approach was put forward by Ibn Ḥazm of the Ẓāhiriyyah School, who even completely rejected the application of *ḥudūd* to *liwāṭ*. He argued that the Qur'an and Ḥadīth do not explicitly stipulate worldly punishment for *liwāṭ* perpetrators, making the imposition of death or stoning excessive (Adang 2003). Instead, he proposed a form of corrective sanction, a maximum penalty of ten lashes or imprisonment (‘Awdah, n.d., vol. II: 353). This approach demonstrates a more moderate and humanistic orientation, viewing the perpetrator as a subject capable of rehabilitation and reform.

This diversity of views demonstrates that while there is consensus on the prohibition of *liwāṭ*, the legal sanctions fall across a broad spectrum—from the most stringent *hudūd* to the more flexible *taʿzīr*. According to *Abū Ḥanīfah*, the punishment for committing *liwāṭ* cannot be equated with stoning or 100 lashes, as is the case with adultery. *Taʿzīr* can be a severe punishment, including death, but not as *hudūd*, but instead based on political considerations or a focus on public welfare (‘Awdah, n.d., vol. II: 387).

This understanding is important to emphasise because the term "homosexuality" in contemporary discourse refers more to sexual identity, while classical *fiqh* addresses sexual acts. Therefore, directly equating the two risks is an achronism—inserting a modern concept into a classical text that has a different epistemological framework.

Ultimately, this diversity of *fiqh* views not only illustrates the intellectual dynamics of Islamic law but also opens up space for *ijtihād* and adaptation to different socio-legal contexts. The flexibility of the *taʿzīr* concept provides a normative basis for the possibility of legal reformulation in addressing the issue of homosexuality in modern society, including in the Indonesian context, which still faces the problem of the lack of explicit criminal regulations regarding consensual same-sex relations. Thus, the classical discourse on *liwāṭ* is relevant as a basis for formulating legal policies that take into account the principles of public welfare and social plurality.

## The Position of *Liwāṭ* in Indonesian Positive Law

In Indonesian positive law, the term '*liwāṭ*' is not recognised as a term of art. In both the colonial Criminal Code and the new criminal code (Law No. 1 of 2023), consensual same-sex relations between adults are not categorised as a criminal offense (Butt 2023). The existing regulations only target certain crimes against morality, such as adultery with a married person, sexual relations with a child, and crimes involving coercion. This situation marks a clear departure from the Islamic legal paradigm, which, from the outset, viewed *liwāṭ* as a crime with criminal consequences.

This position is a legacy of the Dutch colonial legal construction, which only criminalised sodomy when committed against a child or with violence. This orientation has remained unchanged in national law. Even in the 2022 Criminal Code, the same legal logic remains: provisions regarding moral offences are only extended to adultery (Article 411) and cohabitation (Article 412), without positioning same-sex relationships as a separate criminal norm (Maharani et al. 2025). Thus, the Criminal Code remains unavailable for criminalising homosexuality.

This absence of a norm should not only be understood as a "vacuum of articles", but also as a consequence of the principle of legality (*nullum crimen sine lege*) in criminal law—the state consciously limits its intervention to the private moral realm that does not result in victims or violate the rights of others. Constitutional Court Decision No. 46/PUU-XIV/2016 strongly affirms this principle. In its decision rejecting AILA's judicial review, the Constitutional Court (MK) concluded that expanding the scope of criminalisation to include voluntary relationships between adults was a matter of legal policy choice for lawmakers, not a judicial domain (Ramadhan 2023; Ansori and Zain 2019). The Constitutional Court also emphasised that criminalising private behaviour has the potential to violate the human rights to privacy, bodily autonomy, and freedom of expression.

In a regional context, Aceh presents a model of legal pluralism operating within the national legal system. Through *Qanun Jinayat* No. 6 of 2014, Aceh criminalised *liwāṭ*, with penalties of up to 100 lashes or 100 months' imprisonment (Harahap et al. 2024). This implementation is made possible by Aceh's special autonomy status, which permits the application of sharia norms in the criminal sphere (Lawang et al. 2024). Therefore, Aceh is not simply a "geographic exception", but rather a conceptual challenge to the assumption that

Indonesia has a single, homogeneous criminal legal system. (Manse 2024) The existence of the *Qanun* demonstrates that the choice not to criminalise homosexuality at the national level does not mean that other jurisdictions do the opposite.

Although there is no explicit prohibition in the Criminal Code, law enforcement practices demonstrate cultural criminalisation through other legal instruments, such as the Pornography Law, broadcasting regulations, and public order regulations (Putri et al. 2023). It indicates an ambivalence in legal policy: the state does not recognise homosexuality as a crime but continues to control it through administrative law or public morality. The debate between civil society groups emphasises human rights protection (Arimoro 2021; Dedihasriadi et al. 2022; Gupta 2020). And conservative groups demand the state safeguard public morality (Davies 2020; Heaven and Oxman 1999). Demonstrates that the "silence of the law" is actually an arena for normative politics.

Thus, *liwāṭ*'s position in Indonesian positive law lies in a grey area: neither criminalised nationally nor entirely accepted socially or politically. This situation raises questions about the direction of Indonesian criminal law policy: will the state continue to distinguish between the moral and legal realms by upholding the principle of legality, or will it instead follow the push for criminalisation based on religious values?

From an Islamic legal perspective, the principle of *dar' al-ḥudūd bi al-shubuhāt* (avoiding the application of *ḥudūd* in doubtful circumstances) can be repositioned not as a moral justification, but as a methodological argument that caution in sentencing is a legal ethic that can also serve as a normative bridge for reforming national criminal law. Therefore, an interactive analysis of legal doctrine, legislative politics, and sharia values is necessary so that the issue of *liwāṭ* is not merely approached from a legal-formalistic perspective, but also philosophically as a formulation of the limits of state authority in the realm of morality.

## The Void of Norms and the Problem of the Principle of Legality

One of the key issues in Indonesian criminal law regarding *liwāṭ* is the applicability of the principle of legality (Varuhas 2020). This principle asserts that no act can be punished without a pre-existing legal basis (*nullum crimen sine lege, nulla poena sine lege*) (Rosyid 2018). The principle of legality consists of four essential elements: *lex scripta* (only written law can be the basis for punishment),

*lex certa* (the formulation of the offense must be clear), *lex stricta* (the prohibition of interpretation that goes beyond the provisions), and *lex praevia* (the prohibition of retroactivity). In the context of same-sex relationships between adults, these four elements operate simultaneously: because there are no clear written regulations, law enforcement officials have no basis to criminalise them.

This situation is not merely a "norm vacuum", but also a state policy choice not to criminalise same-sex relationships between adults. In criminal law, problems arise when a segment of society views an act as a violation of public morality, but this is not addressed in positive law. Those based on religious values consider *liwāṭ* to be prohibited. At the same time, the positive legal system adheres to the principle of legality and therefore does not provide a criminal sanction. This tension was evident, for example, in the 2016 wave of moral panic that demanded the criminalisation of LGBT people. However, the state was unable to process the request due to the lack of a clear legal basis (Barbash 2023; Thomas et al. 1976).

This debate intensified at the Constitutional Court (MK). In 2016, the applicant filed a judicial review requesting an expansion of the definition of adultery in the Criminal Code to include same-sex relations. However, the Constitutional Court rejected the request, asserting that changes to criminal norms are the authority of lawmakers, not judges (Sujana et al. 2018). This ruling demonstrates the Constitutional Court's caution in not creating new criminal offences through judicial interpretation, while also affirming the principle of legality's dominance in the Indonesian criminal law system.

The absence of an explicit prohibition in the Criminal Code impacts law enforcement practices. Officials use other legal instruments—such as the Pornography Law, the Electronic Information and Transactions Law, or public order regulations—to prosecute activities associated with homosexuality. This pattern is known as indirect criminalisation, as it is not the sexual orientation that is being charged, but rather other contexts, such as the distribution of content or activities in public spaces. Formally, this approach can still be considered not to violate the *lex certa* principle. However, it raises ethical debate because it expands the scope of criminalisation through articles that serve different purposes.

Meanwhile, the implementation of the *Qanun Jinayat* in Aceh is evidence of legal pluralism within the framework of a unitary state. In Aceh, same-sex relations are punished with caning, while in other regions this is not the case (Khairani 2019). This difference raises questions about legal certainty in an

ideally unified legal system. Normatively, the principle of legality operates at two levels: national and regional. As long as the authority is granted by law, regions can establish different norms. However, this diversity of norms does not always align with the goal of national criminal law unification, thus highlighting the tension between system integration and regional autonomy.

Thus, the problem arising from the *liwāṭ* issue is not only a clash of moral and religious values, but also a direct consequence of the principle of legality itself. The state is obliged to adhere to the principle of not punishing without a legal basis. At the same time, social pressure demands that the state fill the gap in norms. This conflict between moral legitimacy and legal constitutionality presents a central challenge in the development of criminal law in Indonesia, particularly in striking a balance among the principles of legality, protection of public morals, and respect for human rights.

## Comparison with Criminal Law in Other Countries

Each country has a different approach to homosexuality. In some countries that strictly implement Islamic criminal law, such as Saudi Arabia, Iran, and Sudan, homosexuality is categorised as a serious crime (*jarīmah ḥudūd*) (Yadegarfard 2019; Swedish International Development Cooperation Agency (Sida) 2021; Human Dignity Trust, n.d.). Punishments vary, ranging from the death penalty to stoning to flogging. This model stems from the classical understanding of Islamic jurisprudence, which views *liwāṭ* as a deviant act threatening society's moral order.

In contrast, many Western countries have taken a different approach. Since the mid-20th century, several European and American countries have begun to decriminalise adult same-sex relations. A key turning point came with the 1981 Dudgeon v. United Kingdom ruling by the European Court of Human Rights (ECHR), which ruled that laws criminalising consensual adult homosexual relations violated the right to privacy guaranteed by Article 8 of the European Convention, making the criminalisation unlawful. This case set a precedent for other rulings, including Norris v. Ireland and Modinos v. Cyprus , in which the ECHR reaffirmed that prohibiting consensual adult same-sex relations violates the right to privacy and individual liberty. Building on this jurisprudence, many countries in Europe and related regions have since decriminalised homosexuality. Some countries have gone even further:

recognising the rights of same-sex couples through marriage or civil unions (Shahid 2023; Rozenberg and Scheepers 2022; Geis et al. 1976).

Southeast Asian countries demonstrate a diversity of approaches. Malaysia, for example, still criminalises homosexuality under Article 377A of the Criminal Code, a legacy of British colonial rule. Punishments can include imprisonment and flogging. However, as in Indonesia, law enforcement in Malaysia often sparks controversy because it is considered discriminatory and contrary to human rights principles (Tsabitha and Rosmaya 2025; Tan 2025).

Singapore once had a similar law, but in 2022, the government repealed Article 377A, making consensual homosexual relations between adults no longer criminalised. This move was seen as a compromise between conservative groups opposing same-sex marriage and progressive groups demanding recognition of LGBT rights (Abdullah 2023; Yu and Lam 2023). Thus, Singapore is an example of a country attempting to balance traditional values with modern legal developments.

In the Middle East, differences are also striking. Jordan and Turkey, for example, do not criminalise homosexuality, even though social norms remain strongly opposed. It demonstrates that excluding criminal sanctions does not automatically mean social acceptance. Conversely, positive law can be neutral, but societal stigma remains a significant limiting factor (Human Rights Watch 2022; Issa and Al-Taraira 2021; Engin 2015).

This comparison demonstrates that legal policy towards homosexuality is heavily influenced by cultural, religious, political, and international factors. Indonesia currently finds itself in an ambiguous position: it does not criminalise same-sex relations between adults but also does not provide clear legal recognition or protection. This situation places Indonesia at a crossroads between upholding the principle of legality in the face of a normative vacuum or following the global trend towards depenalisation.

## A Human Rights Perspective in a Legal Vacuum

Human rights are an important dimension in discussing homosexuality, particularly when there is a legal vacuum. Basic human rights principles affirm that everyone has the right to privacy protection, freedom of expression, and freedom from discrimination (Dedihasriadi et al. 2022). In this context, consensual same-sex relationships between adults are considered a private matter that should not be criminalised.

At the international level, various human rights instruments have affirmed this principle. The International Covenant on Civil and Political Rights (ICCPR), ratified by Indonesia through Law No. 12 of 2005, guarantees the right to privacy (Article 17) and equality before the law (Article 26). The Toonen v. Australia ruling by the UN Human Rights Committee even explicitly stated that criminalising homosexuality violates the right to privacy (Perrin 2023). Thus, countries that continue to punish homosexuality potentially violate their international obligations.

However, the application of human rights principles to the issue of homosexuality often clashes with cultural and religious values. In Indonesia, the majority of society still rejects recognition of LGBT behaviour, arguing that it violates public morality (Nurnisaa AS and Okta Y 2024). It places the state in a dilemma: on the one hand, it is bound by international human rights commitments, while on the other, it must heed local values prevalent in society.

The gap in norms in Indonesian criminal law can be understood as a consequence of various factors. The absence of regulations regarding same-sex relationships between adults may arise from a lack of political consensus, limited legislative capacity, or a choice not to regulate it to avoid social conflict. With this position, the state does not explicitly criminalise it but also does not provide legal recognition. This approach demonstrates an effort to maintain a balance between international obligations and domestic aspirations, while leaving potential legal uncertainty.

Furthermore, this legal vacuum opens up room for informal discrimination. Despite the absence of specific criminal laws, the LGBT community in Indonesia still frequently faces persecution, raids, and stigmatisation (Polymenopoulou 2018). This situation demonstrates that the absence of regulations does not necessarily mean protection. Instead, the state is potentially negligent in protecting citizens' rights from violence based on sexual orientation.

Therefore, a human rights perspective emphasises that this legal vacuum must be addressed immediately through clear regulations and policies protecting civil rights. The challenge is how Indonesia can formulate a balanced legal approach, respecting religious and cultural values while simultaneously fulfilling its constitutional and international obligations to protect the human rights of every citizen.

## Implications of the Normative Void on Law Enforcement Practices

The lack of norms regarding same-sex relationships between adults has a direct impact on law enforcement practices. Authorities lack a clear legal basis for processing them, so criminalisation is often carried out through other regulations, such as the Pornography Law or public order laws. However, this situation does not merely demonstrate legal oversight (Hapsari 2021). Regulatory ambiguity actually functions as a mechanism of power: the state maintains ambiguity to continue monitoring, prosecuting, and suppressing certain groups without explicitly criminalising them (Maharani et al. 2025). In this way, the lack of norms becomes a technique of control, creating legal uncertainty for authorities and generating fear in the community.

The lack of certainty in norms leads to inconsistent law enforcement. (Yulius 2017) For example, in a 2017 raid on a sauna in Jakarta, 141 men were arrested — but only 10 were subsequently convicted under the Pornography Law; the rest were acquitted. Some other cases, such as the 2025 raid on a "gay party" in Bogor, resulted in the release of many suspects despite prior detention (Human Rights Watch 2018). Because there is no specific law regulating consensual same-sex relations, courts often struggle to prove a "crime", leading many cases to fail to reach a final verdict (Ilga Asia 2025). This regulatory uncertainty reinforces the impression that homosexuality is not legally recognised but can still be pursued through alternative legal means, creating uncertainty for both authorities and the public (Mcdonald 2020).

Furthermore, the legal void encourages repressive approaches that do not always comply with the principle of due process of law (Nugroho et al. 2025). For example, raids are often conducted without a strong legal basis. Such actions lead to human rights violations, particularly the rights to privacy and individual liberty. Officials are vulnerable to committing morality-based criminalisation without adequate legal legitimacy.

From a societal perspective, the lack of norms reinforces the stigma against LGBT groups (Earnshaw et al. 2024). Although there are no legal regulations prohibiting it, society often considers homosexual behaviour a crime. As a result, persecution and discrimination are often carried out socially, even without the involvement of state officials. It demonstrates the gap between written law and social practice.

This situation places the state in a strategic position in managing the relationship between religious values, culture, and international obligations. Law

enforcement officials face not only ethical dilemmas but also moral and political calculations: how to present themselves as guardians of public morality without appearing to violate human rights and the law. Within this framework, the vacuum of norms is utilised to maintain a flexible space for action, resulting in ambiguous and inconsistent law enforcement practices—not due to incompetence, but rather as a form of managing the fear of certain groups.

Thus, the implications of this lack of norms are quite profound. In addition to undermining legal certainty, it also has the potential to undermine the principles of justice and the protection of human rights. To address this, transparent and balanced regulations are needed so that law enforcement can proceed on a legitimate, consistent basis and in accordance with constitutional principles.

## Power Relations in the Harmonisation of Islamic Law, Positive Law, and Human Rights

Efforts to harmonise Islamic law, Indonesian positive law, and human rights principles do not occur in a neutral space. These three legal regimes operate within an unequal power relationship: positive law has the coercive authority of the state, and Islamic law enjoys the moral legitimacy of the majority. At the same time, human rights discourse is often portrayed as an external value that must be adapted to local contexts. Therefore, "harmonisation" cannot be understood as an automatic, normative unification but rather as a process of political and moral negotiation that determines the limits of each legal system's authority in public life.

In the context of *jarīmah liwāṭ*, classical Islamic law considers it a serious violation of the moral order of society, with very harsh sanctions (Ermayani 2017; Pascadinianti 2025). However, the application of these norms to a modern state must take into account the framework of the rule of law, particularly the principles of legality, constitutionalism, and the protection of human rights. Therefore, harmonisation at the substantive level does not mean directly adopting Sharia criminal sanctions, but instead articulating Sharia values within a national legal framework that guarantees certainty and justice for all citizens.

Current Indonesian law does not criminalise consensual same-sex relations between adults. This regulatory gap creates tension between the moral demands of the majority and the state's obligation to maintain legal certainty and non-discrimination. In this context, harmonisation can be understood as a policy

model that safeguards public space from acts that disrupt public order, without criminalising individuals based on their sexual orientation. The focus shifts from regulating personal identity to regulating behaviour that has social impacts.

Human rights principles guarantee the right to privacy, protection from discrimination, and freedom of expression. However, international human rights law also recognises restrictions that are subject to strict conditions: they must be regulated by law, proportionate, and necessary to protect public order (Gunatilleke 2020). Therefore, the orientation of harmonisation is not aimed at correcting sexual identity but rather at ensuring that the protection of individual privacy goes hand in hand with the maintenance of social values in the public sphere. This approach aligns with the principle that public morality should not be translated into the enforcement of private morality.

In policy terms, realistic harmonisation is closer to a social risk management approach rather than criminalisation. The state can strengthen mechanisms for public education, reproductive health, and protection from violence and sexual exploitation without assuming that homosexuality is a deviance that requires criminalisation. Thus, the law serves not as a tool of identity discipline but as an instrument for protecting and fulfilling rights in a pluralistic society.

Harmonisation also requires an accountable deliberative framework, such as human rights compliance testing, inclusive public engagement, and apparent limitations on the moral claims of the majority. Without such mechanisms, so-called participatory dialogue will only reproduce the dominance of the ruling group. A transparent negotiation process based on objective standards enables the rational testing of religious claims, legal arguments, and human rights principles within a constitutional framework.

With this approach, harmonisation does not subordinate one system to another; instead, it facilitates a unified understanding. Islamic law can serve as a source of public ethical values. In contrast, positive law continues to guarantee the principle of legality, and human rights serve as safeguards against excesses of moral coercion. This model enhances the legal legitimacy of Indonesia as a democratic state rooted in religious values, while remaining consistent with its constitutional commitment to justice and the human rights of every citizen.

## Conclusion

This research demonstrates that *jarīmah liwāṭ* in Islamic criminal law is viewed as a serious violation that threatens the moral and social order of society. Classical scholars, particularly those of the *Shāfi'ī* school of thought, prescribe harsh sanctions, including the death penalty, for perpetrators. Meanwhile, in Indonesian positive law, consensual same-sex relations between adults are not explicitly regulated because the legal system adheres to the principle of legality. This normative vacuum creates legal uncertainty when demands for public moral values clash with human rights principles that emphasise individual freedom and privacy.

The novelty of this research lies in its comparative analysis, which connects the concept of *jarīmah* in Islamic jurisprudence (*fiqh al-jināyah*) with the normative vacuum in Indonesian criminal law. Unlike previous research that has focused solely on theological or human rights aspects, this study identifies areas of legal inconsistency. It provides a conceptual basis for developing regulations that combine the dimensions of punishment, prevention, education, and rehabilitation proportionately. Thus, this research provides a more integrative academic contribution to examining the relationship between Islamic law, national law, and human rights in Indonesia.

This article offers two recommendations. First, the formulation of legal policy regarding homosexuality should involve an interdisciplinary and comparative approach that encompasses the study of Islamic criminal law, national criminal law, and human rights studies. Further research could employ comparative methods or doctrinal-empirical studies to ensure that the resulting regulatory model remains contextual and aligned with societal needs. Second, this article provides practical insights for lawmakers. Future legal products should not rely solely on criminalisation but also incorporate prevention and rehabilitation mechanisms—for example, through public education policies and protection from violence or exploitation. Comparative references to several Muslim-majority countries that have contextualised Sharia norms within a modern legal framework could also enrich the harmonisation model, making it more applicable in Indonesia. With this approach, legal development can be more responsive to social, moral, and human rights dynamics while remaining aligned with the country's constitutional commitments.

## Bibliography

Abdullah, Walid Jumblatt Bin. 2023. 'The Politics of Compromise: Analyzing the Repeal of Section 377A in Singapore'. *Pacific Affairs An International Review of Asia and the Pacific* 96 (1). https://doi.org/10.5509.2023961105.

Adang, Camilla. 2003. 'Ibn Ḥazm on Homosexuality. A Case-Study of Ẓāhirī Legal Methodology'. *Al-Qanṭara* 24 (1): 5–31. https://doi.org/10.3989/alqantara.2003.v24.i1.172.

Ansori, Ansori, and Muhammad Fuad Zain. 2019. 'Analysis of the Constitution Court Verdict Number 46/PUU-XIV/2016 about Morality Criminal'. *Yuridika* 34 (2): 261–78. https://doi.org/10.20473/ydk.v34i2.9820.

Arimoro, Augustine Edobor. 2021. 'Interrogating the Criminalisation of Same-Sex Sexual Activity: A Study of Commonwealth Africa'. *Liverpool Law Review* 42 (3): 379–99. https://doi.org/10.1007/s10991-021-09280-5.

'Awdah, 'Abd al-Qādir. n.d. *Al-Tashrī' al-Jinā'ī Fī al-Islām Muqāranan Bi al-Qānūnī al-Waḍ'ī*. Dār al-Kutub al-'Ilmiyyah.

Badgett, M.V. Lee, Kees Waaldijk, and Yana van der Meulen Rodgers. 2019. 'The Relationship between LGBT Inclusion and Economic Development: Macro-Level Evidence'. *World Development* 120 (August): 1–14. https://doi.org/10.1016/j.worlddev.2019.03.011.

Barbash, Daria. 2023. 'Conflict between Morality and Law in Criminal Proceedings: Theoretical Aspects and Practical Examples'. *SOCRATES. Rīgas Stradiņa Universitātes Juridiskās Fakultātes Elektroniskais Juridisko Zinātnisko Rakstu Žurnāls / SOCRATES. Rīga Stradiņš University Faculty of Law Electronic Scientific Journal of Law* 3 (27): 9–16. https://doi.org/10.25143/socr.27.2023.3.09-16.

Butt, Simon. 2023. 'Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?' *Griffith Law Review* 32 (2): 190–214. https://doi.org/10.1080/10383441.2023.2243772.

Davies, Sharyn. 2020. 'Indonesia: The Rise of Moral Conservatism'. Preprint, Asia Media Centre.

Dedihasriadi, La ode, Ju-Lan Hsieh, and Wahyudi Umar. 2022. 'Same-Sex Marriage as a Human Rights Freedom in Indonesia: The Perspective of Pancasila and the Marriage Law'. *Jambura Law Review* 4 (2): 214–26. https://doi.org/10.33756/jlr.v4i2.14067.

Earnshaw, Valerie A., Carmen Logie, Jeffrey A. Wickersham, and Adeeba Kamarulzaman. 2024. 'LGBTQ Stigma'. Ch. 2 in *Global LGBTQ Health*. Springer, Cham. https://doi.org/10.1007/978-3-031-36204-0_2.

Engin, Ceylan. 2015. 'LGBT in Turkey: Policies and Experiences'. *Social Sciences* 4 (3): 838–58. https://doi.org/10.3390/socsci4030838.

Ermayani, Tri. 2017. 'LGBT Dalam Perspektif Islam'. *HUMANIKA* 17 (2): 147–68. https://doi.org/10.21831/hum.v17i1.18569.

Feener, R. Michael. 2013. 'Social Engineering Through Shari'a: Islamic Law and State-Directed Da'wa in Contemporary Aceh'. *Indonesia Law Review* 3 (3): 285–310. https://doi.org/10.15742/ilrev.v3n3.42.

Garcia Rodriguez, Diego. 2024. 'Reimagining Home and Responsibility: The Case of Queer Indonesian Muslims'. *Sexualities*, ahead of print, May 16. https://doi.org/10.1177/13634607241248894.

Geis, Gilbert, Richard Wright, Thomas Garrett, and Paul R. Wilson. 1976. 'Reported Consequences of Decriminalization of Consentual Adult Homosexuality in Seven American States'. *Journal of Homosexuality* 1 (4): 419–26. https://doi.org/10.1300/J082v01n04_05.

Gunatilleke, Gehan. 2020. 'Justifying Limitations on the Freedom of Expression'. *Human Rights Review* 22 (1): 91–108. https://doi.org/10.1007/S12142-020-00608-8.

Gupta, Tejasvi. 2020. 'Case Comment: Decriminalizing Consensual Same-Sex Relations'. *SSRN Electronic Journal*, ahead of print. https://doi.org/10.2139/ssrn.3842311.

Hapsari, Ifahda Pratama. 2021. 'Criminalization of LGBT (Lesbian, Gay, Bisexual, and Transgender) Criminal Act and Its Law Enforcement Efforts in Indonesia'. *Justitia: Jurnal Hukum* 5 (2): 203–13. https://doi.org/10.30651/justitia.v6i02.9224.

Harahap, Rustam DKA. 2016. 'LGBT Di Indonesia: Perspektif Hukum Islam, HAM, Psikologi Dan Pendekatan Maṣlaḥah'. *Al-Ahkam* 26 (2): 223–48. https://doi.org/10.21580/ahkam.2016.26.2.991.

Harahap, Zul Anwar Ajim, Zulfan, and Muhammad Ridwan. 2024. 'Analyzing the Offense of Juvinile Khalwat in Aceh: Evaluation of Qanun Number 14 of 2003 from an Islamic Legal Perspective'. *Al-Manahij: Jurnal Kajian Hukum Islam* 18 (1): 79–94. https://doi.org/10.24090/mnh.v18i1.10648.

Heaven, Patrick C.L, and Lisa N Oxman. 1999. 'Human Values, Conservatism and Stereotypes of Homosexuals'. *Personality and Individual Differences* 27 (1): 109–18. https://doi.org/10.1016/S0191-8869(98)00216-5.

Human Dignity Trust. n.d. 'Country Profile: Saudi Arabia.' Humandignitytrust.Org. https://www.humandignitytrust.org/country-profile/saudi-arabia/.

Human Rights Watch. 2018. *Scared in Public and Now No Privacy*.

Human Rights Watch. 2022. *Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity-Jordan*. New York.

Ilga Asia. 2025. 'Indonesia: 75 People Arrested in Discriminatory Raid on Alleged "Gay Party"'. Ilgaasia.Org. https://ilgaasia.org/news/indonesiajul2025/.

Issa, Hamzeh Abu, and Mohammad Al-Taraira. 2021. 'Criminalization of Sexual Acts in Jordanian Law (Comparative Study)'. *International Journal of Criminology and Sociology* 10 (May): 1107–11. https://doi.org/10.6000/1929-4409.2021.10.128.

Joeha, Avif Alfiyah, Fitrah Sugiarto, Salwa Dama Nazila, and Shofiyah Shofiyah. 2025. 'Homoseksual: Analisis Hukum Dan Nilai Moral Dalam Islam (Studi Mawdlui Perspektif Tafsir Ibnu Katsir)'. *Madinah: Jurnal Studi Islam* 12 (1): 161–75. https://doi.org/10.58518/madinah.v12i1.3576.

Khairani, Khairani. 2019. 'Law Enforcement Against Lesbian, Gay, Bisexual, and Transgender (LGBT) Phenomena in The Qanun Jinayah in Aceh'. *AL-'ADALAH* 16 (1): 155–76. https://doi.org/10.24042/adalah.v16i1.3912.

Lawang, Karimuddin Abdullah, Nur Kholis, Tri Tarwiyani, Mustafa Kamal, Muhammad Yasir, and Asnawi Abdullah. 2024. 'Implementation of Uqubat: An Effort to Minimize Khalwat Crimes in Aceh'. *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 24 (1): 28–41. https://doi.org/10.30631/alrisalah.v24i1.1427.

Maharani, Yasva Wima Aulia, Chesya Arneta Rizdiatama, Aulya Zalzabilla `Aziizah, et al. 2025. 'Urgency of Regulating Same-Sex Lewd Acts by Adults in Indonesian Criminal Law'. *Lex Favor Reo* 1 (1): 44–66.

Manse, Maarten. 2024. 'The Plural Legacies of Legal Pluralism: Local Practices and Contestations of Customary Law in Late Colonial Indonesia'. *Legal Pluralism and Critical Social Analysis* 56 (3): 328–48. https://doi.org/10.1080/27706869.2024.2377447.

Mcdonald, Joshua. 2020. 'LGBT Community Targeted by Police in Indonesia'. Thediplomat.Com. https://thediplomat.com/2020/09/lgbt-community-targeted-by-police-in-indonesia/.

Murtagh, Ben. 2022. '"There's No Place for Us Here"'. *Indonesia and the Malay World* 50 (146): 118–38. https://doi.org/10.1080/13639811.2022.2026618.

Nugroho, Wahyu Catur Adi, Robin Mulki Ramadhan, Dede Bagus Sadewo, Abdi Nauffal Satria Eraffif, and Sarah Tri Nur Firman Ramadhan. 2025. 'Legal Vacuum of LGBT in Indonesia: A Multidimensional Analysis of Implications, Challenges, and Solutions'. *Lex Favor Reo* 1 (1): 14–28.

Nurnisaa AS, and Setyo Luthfi Okta Y. 2024. 'Bridging Legal, Religious, and Human Rights Perspectives on LGBT Issue'. *International Journal of Humanities, Law, and Politics* 2 (4): 110–13. https://doi.org/10.46336/ijhlp.v2i4.165.

Omar, Sara. 2012. 'From Semantics to Normative Law: Perceptions of Liwāt (Sodomy) and Sihāq (Tribadism) in Islamic Jurisprudence (8th-15th Century CE)'. *Islamic Law and Society* 19 (3): 222–56. https://doi.org/10.1163/156851912X603193.

Pascadinianti, Meidana. 2025. 'A Critical Analysis of Islamic Law and Human Rights in Early Childhood Protection'. *Jurnal Obsesi : Jurnal Pendidikan Anak Usia Dini* 9 (4): 983–1004. https://doi.org/10.31004/obsesi.v9i4.6913.

Perrin, Ayodeji Kamau. 2023. 'The Evolution of Sodomy Decriminalization Jurisprudence in Transnational and Comparative Constitutional Perspective'. *William & Mary Bill of Rights Journal* 32 (1): 239–320.

Polymenopoulou, Eleni. 2018. 'LGBTI Rights in Indonesia: A Human Rights Perspective'. *Asia-Pacific Journal on Human Rights and the Law* 19 (1): 27–44. https://doi.org/10.1163/15718158-01901002.

Putri, Windy Virdinia, Gumilang Fuadi, and Muh. Endrio Susila. 2023. 'The Criminal Punishment of LGBTQ: A Comparative Study of Nigerian and Indonesian Laws'. *Audito Comparative Law Journal (ACLJ)* 4 (3): 147–58. https://doi.org/10.22219/aclj.v4i3.28217.

Ramadhan, Febi R. 2023. 'An Ontological Struggle: Islamic Political Theology and the Criminalization of Same-Sex Sexuality in Indonesia'. *PoLAR: Political and Legal Anthropology Review* 46 (2): 160–76. https://doi.org/10.1111/plar.12536.

Rehman, Javaid, and Eleni Polymenopoulou. 2013. 'Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World'. *Fordham International Law Journal* 37 (1).

Rodríguez, Diego García, and Ben Murtagh. 2022. 'Situating Anti-LGBT Moral Panics in Indonesia'. *Indonesia and the Malay World* 50 (146): 1–9. https://doi.org/10.1080/13639811.2022.2038871.

Rosyid, Maskur. 2018. 'Istiṣḥāb Sebagai Solusi Pemecahan Masalah Kekinian'. *Syariah Jurnal Hukum Dan Pemikiran* 18 (1): 45–64. https://doi.org/10.18592/sy.v18i1.2125.

Rozenberg, Tessa, and Peer Scheepers. 2022. 'Rejection of Equal Adoption Rights for Same-Sex Couples Across European Countries: Socializing Influences on the National Level and Cross-National Interactions'. *Social Science Quarterly* 103 (2): 274–93. https://doi.org/10.1111/ssqu.13129.

Shahid, Masuma. 2023. 'Equal Marriage Rights and the European Courts'. *ERA Forum* 23 (3): 397–411. https://doi.org/10.1007/s12027-023-00729-w.

Sujana, I Nyoman, Komang Arini Setyawati, and Ni Made Puspasutari Ujanti. 2018. 'The Existence of the Lesbian, Gay, Bisexual and Transgender (LGBT) Community in the Perspective of a State Based on Pancasila'. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30 (1): 126. https://doi.org/10.22146/jmh.28655.

Swedish International Development Cooperation Agency (Sida). 2021. 'Rights of LGBT Persons Sudan & South Sudan'. Preprint, SIda.

Tan, Kyle. 2025. 'Setting the Priorities for LGBT+ Research and Intervention Effort in Malaysia Through Community Voices: A Brief Report'. *Community Health Equity Research & Policy* 45 (4): 405–9. https://doi.org/10.1177/2752535X241273831.

Thajib, Ferdiansyah. 2017. 'Kaleidoscopic Feelings: Faith Narratives among Indonesian Muslim Queers'. *Emotion, Space and Society* 25 (November): 127–35. https://doi.org/10.1016/j.emospa.2016.11.007.

Thomas, Charles W., Robin J. Cage, and Samuel C. Foster. 1976. 'Public Opinion on Criminal Law and Legal Sanctions: An Examination of Two Conceptual Models'. *The Journal of Criminal Law and Criminology* 67 (1): 110–16.

Tsabitha, Calista Marsha, and Ina Rosmaya. 2025. 'Comparative Study of the Criminal Regulation of Homosexual Acts in Indonesian and Malaysian

Law'. *Journal of Court and Justice* 4 (2): 40–56. https://doi.org/10.56943/jcj.v4i2.793.

Varuhas, Jason N.E. 2020. 'The Principle of Legality'. *The Cambridge Law Journal* 79 (3): 578–614. https://doi.org/10.1017/S0008197320000598.

Wahyuni, Afidah. 2018. 'Sodomi Dalam Perspektif Ulama Fikih'. *Al-Mizan: Jurnal Hukum Islam Dan Ekonomi Syariah* 2 (1): 84–94. https://doi.org/10.33511/almizan.v2n1.84-94.

Yadegarfard, Mohammadrasool. 2019. 'How Are Iranian Gay Men Coping with Systematic Suppression Under Islamic Law? A Qualitative Study'. *Sexuality & Culture* 23 (4): 1250–73. https://doi.org/10.1007/s12119-019-09613-7.

Yu, Andrew, and Stephanie Kwan Nga Lam. 2023. 'Decriminalising Homosexuality in Singapore: Political Responses from the Perspective of Secularism and Electoral Pragmatism'. *The Round Table* 112 (2): 163–72. https://doi.org/10.1080/00358533.2023.2202948.

Yulius, Hendri. 2017. 'Moral Panic and the Reinvention of LGBT'. Indonesiaatmelbourne.Unimelb.Edu.Au. https://indonesiaatmelbourne.unimelb.edu.au/moral-panic-and-the-reinvention-of-lgbt/.

Zaharin, Aisya Aymanee M. 2022. 'Reconsidering Homosexual Unification in Islam: A Revisionist Analysis of Post-Colonialism, Constructivism and Essentialism'. *Religions* 13 (8): 702. https://doi.org/10.3390/rel13080702.