

Comparison of Islamic Law and Human Rights; Navigating Consensus of LGBT in Thailand

Aidatul Fitriyah¹, Muhammad Badat Alauddin²

¹Airlangga University, Airlangga Street Number 4 - 6, Airlangga, Gubeng District, Surabaya City, East Java 601151, | aidatul.fitriyah-2020@fib.unair.ac.id

²Islamic International University Islamabad, H10, Islamabad, 44000, Pakistan | alao.bs2625@iiu.edu.pk

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Abstract: This research aims to examine the dynamics of law and human rights (HAM) related to the LGBT community in Thailand, with a focus on analysing the concept of Islamic epistemology on the social status impact of the idea of gender division in Thailand, theological and juridical comparison of human rights in accommodating LGBT, as well as challenges and efforts to harmonise Islamic law and human rights towards LGBT groups in Thailand. The methodology used is a qualitative approach involving normative and comparative legal analysis. The researcher collected a literature review of secondary data from relevant sources, including scholarly works, books, and legal documents. The results showed significant contradictions between Thailand's more inclusive concept of gender division and the binary nature of Islamic law. The research also uncovered Islamic theological underpinnings against LGBT and compared them with juridical approaches that protect LGBT human rights. It also explores the reconciliation process between Islamic law and human rights in accommodating LGBT through dialogue and stakeholder cooperation. From this research, it can be concluded that LGBT law and human rights tolerance involve a complexity of legal views, religious values, and human rights principles, reflecting ongoing challenges and debates within society and the legal system. **Keywords:** Human Rights, International Law, LGBT, Legal Reconciliation, Islamic Theology.

Abstrak: Penelitian ini bertujuan untuk mengkaji dinamika hukum dan hak asasi manusia (HAM) yang berkaitan dengan komunitas LGBT di Thailand, dengan fokus pada analisis konsep epistemologi islam terhadap dampak status sosial dari konsep pembagian gender di Thailand, perbandingan teologis dan yuridis HAM dalam mengakomodasi LGBT, serta tantangan dan upaya harmonisasi antara hukum Islam dan HAM terhadap kelompok LGBT di Thailand. Metodologi yang digunakan adalah pendekatan kualitatif dengan melibatkan analisis hukum normatif dan komparatif. Peneliti melakukan pengumpulan dengan literature review data sekunder dari sumber-sumber relevan, termasuk kitab hasil pemikiran ulama, artikel ilmiah, buku, dan dokumen hukum. Hasil penelitian menunjukkan kontradiktif yang signifikan antara konsep pembagian gender di thailand yang lebih inklusif dan hukum Islam yang bersifat biner. Penelitian ini juga mengungkap dasar-dasar teologis Islam yang menentang LGBT dan membandingkannya dengan pendekatan yuridis yang melindungi HAM LGBT. Dalam penelitian ini juga mengeksplorasi proses rekonsiliasi antara hukum Islam dan HAM dalam mengakomodasi LGBT melalui dialogue dan kerjasama antar pemangku kepentingan. Dari penelitian ini dapat disimpulkan bahwa hukum LGBT dan toleransi hak kemanusiaan melibatkan kompleksitas pandangan hukum, nilai-nilai agama, dan prinsip hak asasi manusia, yang mencerminkan tantangan dan perdebatan yang terus berlangsung dalam masyarakat dan sistem hukum.

Kata Kunci: Hak Asasi Manusia, Hukum Internasional, LGBT, Rekonsialisasi Hukum, Teologi Islam.

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Introduction

Human rights are an inherent and inseparable set of rights of every individual, regardless of their sexual orientation or gender identity. This principle aligns with Article 1 of the Universal Declaration of Human Rights: "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*"¹ This article asserts that everyone has equal rights from birth, regardless of background or status. Therefore, there is no domination or subordination in this context. This principle is then reinforced in Article 2, which emphasises the importance of equality, justice, and the protection of human rights or reads, "*Everyone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made based on the political, jurisdictional or international status of the country or territory to which a person belongs, whether independent, trust, non-self-governing or under any other limitation of sovereignty.*"²

Although the principles of human rights contained in the Universal Declaration of Human Rights (1948) emphasise the importance of equal protection of human rights regardless of sexual orientation or gender identity, empirical reality often does not reflect this ideal. In a practical context, lesbian, gay, bisexual, and transgender (LGBT) communities in various parts of the world frequently experience discrimination and human rights violations. Although several countries have ratified international human rights instruments protecting LGBT rights, implementing and enforcing these rights still face significant challenges. It is known that 173 countries have ratified the International Covenant on Civil and Political Rights (ICCPR), and 171 countries have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).³ The ICCPR convention has agreed on the right of every individual to live free from discrimination and unfair treatment, including discrimination based on sexual orientation and gender identity. Meanwhile, ICESCR itself affirms the right of every individual to enjoy an adequate standard of living, education, and health, regardless of sexual orientation and gender identity.

However, despite progress in the recognition and protection of LGBT rights at the international level, there are still divergent views between theological and juridical concepts in reconciling human rights. This shows that there are still challenges and obstacles that need to be overcome in the effort to ensure complete protection and respect for the rights of all individuals, including the LGBT community.

The theological concept is based on the teachings of religions, especially Islam, which makes up most of Indonesia's population. This concept tends to reject and forbid LGBT because it is considered contrary to religious norms. Indeed, in Islam itself, the LGBT phenomenon has been told in the Qur'an about gay behaviour (male-to-male relationships) carried out by the people of the prophet Luth. The gay activity is categorised as a horrific act in which men come to men to release lust, not to women. This is revealed in *Al Qur'an*, "*Indeed, you come to men to release your lust (for them), not to women, rather you are a people*

¹ United Nations, "Universal Declaration of Human Rights," Universal Declaration of Human Rights, accessed April 24, 2024, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

² *ibid*

³ Office of the High Commissioner for Human Rights (OHCHR), "Ratification Status for CCPR - International Covenant on Civil and Political Rights," accessed April 20, 2024, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en.

*who transgress the limits, Answer his people nothing but say: Then We saved him and his followers except his wife; she was among those who were left behind (destroyed), and We sent down upon them a rain (of stones); so see what is the end of those who sinned."*⁴ From the verse, it is known that the people's behaviour at the time of the prophet Luth. He started the practice of sodomy in the history of human life.

In addition to homosexual and lesbian issues, there are phenomena of attempts to gain existence, namely those who are bisexual and transgender. Bisexuals are those who have sex with other partners as well as with the same sex. Thus, its existence is something that violates human nature. Likewise, transgender is a form of changing sexual identity from male to female or vice versa. Although in reality, there is such a phenomenon, as human nature, there are only two sexes, namely male and female.

The juridical concept is based on the favourable laws in a national and international country. This concept recognises and protects LGBT people as citizens with the same rights and obligations. One country that can serve as an example in terms of human rights reconciliation related to LGBT is Thailand. Thailand has a sizable and diverse LGBT population and a cultural tradition that is tolerant of difference. Thailand has also taken legal steps to protect and recognise LGBT people, such as passing a civil partnership law in 2020 and allowing gender change on official documents in 2021. However, Thailand still faces challenges in terms of human rights reconciliation, such as social discrimination, violence, and stigma against LGBT people.⁵

In understanding the dynamics of LGBT+ inclusion and human rights in Thailand, the writers have reviewed three similar studies. First, "Perilaku Lesbian Gay Biseksual Dan Transgender (LGBT) Dalam Perspektif Hak Azasi Manusia". This research investigates LGBT behaviour through the human rights lens, examining national and international contexts. Specifically, it aims to understand the impact of LGBT behaviour on society, focusing on Indonesia and its global implications. The study acknowledges the controversy and unrest surrounding LGBT rights in Indonesian and international institutions. While some segments of Indonesian society accept LGBT rights, others hold conservative or discriminatory views shaped by legal and cultural contexts. Globally, human rights organisations recognise the rights of LGBT individuals, including protection from discrimination, access to healthcare, freedom of expression, and the right to form relationships. However, implementation and acceptance vary across different countries and regions.⁶

Secondly, "LGBT in The Perspective of Islamic Law And Human Rights." This study discusses the contradiction between the nature of LGBT as seen by society and the provisions of Islamic law, which is against LGBT behaviour as it is considered to go against God-given human nature. It also touches upon the human rights aspect, where the refusal to accept LGBT groups is seen as a violation of fundamental human rights due to the discriminatory treatment they often receive⁷. Lastly, "A Human Rights Review of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Behaviour in the Perspective of Islamic Law," discusses Islam's view on LGBT behaviour is often perceived negatively and how Islamic Law regulates

⁴ *Quran 7:80-84.*

⁵ Human Rights Watch, "Thailand: Report Title," December 2021, accessed May 10, 2024, https://www.hrw.org/sites/default/files/media_2021/12/thailand1221_web.pdf.

⁶ Fauziah, Samiyono, and Khairiyati, "Perilaku Lesbian Gay Biseksual Dan Transgender (Lgbt) Dalam Perspektif Hak Azasi Manusia," *Jurnal Surya Kencana Satu : Dinamika Masalah Hukum dan Keadilan* 11, no. 2 (2020): 151-162.

⁷ Djaja and C. Nisa, "Lgbt In The Perspective Of Islamic Law And Human Rights," **International Journal of Application on Social Science and Humanities** 1, no. 1 (2023): 1284-1291.

human rights for LGBT individuals. It offers a perspective that contrasts with Thailand's more common secular approach.⁸

These three studies collectively highlight the issue of LGBT in human rights and Islamic law. This has sparked the researcher's interest in analysing the Islamic epistemological concept of social status from the idea of gender division in Thailand, which is more inclusive than the binary view of Islamic law. Furthermore, this study will examine the tension between Islamic theological principles that oppose LGBT and juridical frameworks that support LGBT human rights, highlighting the contradictions. By providing an in-depth perspective on how Thailand's concept of inclusive gender division clashes with Islamic legal views, this study seeks to find a way to bring the two views together to protect LGBT rights within a human rights framework. The results of this study are expected to provide new insights for a broader understanding of LGBT+ inclusion and human rights in Thailand and inspire research and policy in other countries with similar contexts.

This research aims to examine the dynamics of law and human rights (HAM) related to the LGBT community in Thailand, with a focus on analysing the concept of Islamic epistemology on the social status impact of the idea of gender division in Thailand, theological and juridical comparison of human rights in accommodating LGBT, as well as challenges and efforts to harmonise Islamic law and human rights towards LGBT groups in Thailand.

Research Methods

This research methodology adopts a structured qualitative approach, focusing on normative and comparative legal analysis. Normative law is the basic principle in law-making.⁹ Meanwhile, comparative law is a method of inquiry that aims to gain more profound knowledge of specific legal materials by comparing legal systems in different countries.¹⁰ This study involves analysing the differences and similarities between these legal systems, aiming to understand the implementation and background of the law in the country that is the research object. In this case, the writers compare two aspects of law that have been contradictory, namely Islamic law and international law.

The writers analyse how the two laws can find reconciliation to protect LGBTQ marginalised groups in Thailand. This research involves collecting secondary data from various relevant sources, including scholarly works, articles, books, and legal documents. This study involves systematically and consistently collecting data to gain an in-depth understanding of gender division in Thai law and then analysing its implications for social status in Islamic epistemology. In a literature review, the writers evaluated and compared various sources to identify patterns, principles, and legal approaches adopted in other legal contexts. Descriptive analysis techniques were applied to interpret the data obtained from the extensive literature review. This analysis involves examining contradictory theological and juridical interpretations and how these differences affect the protection of human rights, particularly for the LGBT community in Thailand. A comparative approach will enable this

⁸ Haryutama, "Tinjauan Hak Asasi Manusia Terhadap Perilaku Lesbian, Gay, Bisexual, Transgender, dan Queer (Lgbtq) dalam Perspektif Hukum Islam," **Journal of Islamic Law Studies** 3, no. 1 (2020), accessed May 10, 2024, <https://scholarhub.ui.ac.id/jils/vol3/iss1/1>.

⁹ Brian Bix, "Rules and Normativity in Law," in **Problems of Normativity, Rules and Rule-Following**, ed. M. Araszkiwicz et al., Law and Philosophy Library, vol. 111 (Cham: Springer, 2015), https://doi.org/10.1007/978-3-319-09375-8_10.

¹⁰ Mark Van Hoecke, "Methodology of Comparative Legal Research," **Law and Method** (December 2015): DOI: 10.5553/REM/.000010.

research to highlight the differences and similarities between Islamic and international law and identify factors influencing the reconciliation process.¹¹ As such, this methodology aims to provide a comprehensive and structured insight into the legal and social dynamics affecting the LGBT community in Thailand and contribute to the academic and practical understanding of the issue.

Results and Discussion

Islamic Views on the Concept of Gender in Thailand

Thai law recognises three gender categories: male, female, and kathoey (transgender). Kathoey in Thailand has equal rights and obligations with men and women, including marriage, divorce, property ownership, and access to education and employment. In this regard, some legal foundations in Thailand influence the concept of gender division. First, the Gender Equality Act, published in September 2015, aims to eliminate discrimination against transgender individuals. This law demonstrates Thailand's commitment to gender equality and the protection of human rights.¹²

Secondly, Thailand became one of the 187 countries that have ratified the ILO Convention on Discrimination (Employment and Occupation) 1958 (No. 111) on June 13, 2017.¹³ This Convention affirms Thailand's commitment to eliminate discrimination based on gender identity and sexual orientation in the workplace. By ratifying this Convention, Thailand demonstrates its support for equality and human rights principles and takes concrete steps to achieve Decent Work and the UN Sustainable Development Agenda 2030.¹⁴

Finally, the Thailand Parliament has approved the same-sex marriage bill. The bill was passed by a majority of MPs, with 400 of the 415 members present voting in favour.¹⁵ The bill defines marriage as a bond between two individuals without restricting the gender of the partners. This is a significant change from the previous definition that only recognised the bond between a man and a woman. If it becomes law, the bill will give LGBTQ+ couples the same rights to obtain marriage tax savings, inherit property, and consent to medical treatment for incapacitated couples. In addition, married same-sex couples will also be allowed to adopt children. Although the bill has been approved by parliament, it still needs approval from the Senate and royal assent to become an official law. The bill is expected to be passed by the end of 2024.¹⁶

If passed, Thailand will be the only country in Southeast Asia to recognise same-sex marriage legally, cementing its reputation as a haven for LGBTQ+ couples in a region that tends to be otherwise. The passage of this bill will strengthen Thailand's reputation as a safe and welcoming place for the LGBTQ+ community in Southeast Asia, which tends to have a more conservative stance on issues like this. With these legal reforms, Thailand is committed

¹¹ Mario Coccia and Ida Benati, "Comparative Studies," in *Global Encyclopedia of Public Administration, Public Policy, and Governance*, ed. Ali Farazmand (Cham: Springer, 2018), https://doi.org/10.1007/978-3-319-31816-5_1197-1.

¹² "Gender Equality Act B.E. 2558 (2015)", accessed May 10, 2024, <https://law.m-society.go.th/law2016/uploads/lawfile/594cc091ca739.pdf>.

¹³ International Labour Organization. (1958). *C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*.

¹⁴ International Labour Organization, "Thailand ratifies the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)," 2017.

¹⁵ Olarn and H. Regan, "Thailand's lower house passes a bill to legalise same-sex marriage," CNN, March 27, 2024, accessed May 3, 2024, <https://edition.cnn.com/2024/03/27/asia/thailand-passes-marriage-equality-bill-intl-hnk/index.html>.

¹⁶ *ibid*

to respecting and protecting its rights. It is no wonder Thailand is considered one of Asia's most friendly countries for LGBTQ.¹⁷

While Kathoey's gender has been legally recognised, the Islamic view of gender in general remains complex. In Islam, the concept of gender is often understood in a binary framework, which includes men and women, following the teachings of Islamic law. This perspective is based on the understanding that each individual is created with a certain *fitrah*¹⁸ corresponding to their biological nature as male or female, as written in Al Qur'an, "O people! Fear your Lord, who created you from oneself (Adam), and created his mate (Hawa) from himself; and from them, He multiplied many men and women."¹⁹

The verse contains a message about the origin of human creation and the relationship between men and women in Islam. Furthermore, the verse emphasises that all humans come from one soul, which in this verse is the Prophet Adam, and from that soul was created his spouse, Hawa. From these two, Allah multiplied men and women. This shows that Islam has traditionally understood the creation of men and women as two distinct and complementary categories. Gender identities that do not fall within this binary understanding, such as katoey in Thailand, are often considered to be against the tenets of Islamic law as they deviate from the laws of nature and destiny set by Allah.²⁰

However, there is a more inclusive perspective among contemporary Muslim scholars, who recognise the diversity of social and human experience that goes beyond what traditional religious texts describe. They argue that Islam is a religion of *rahmatan lil 'alamin*,²¹ to be applied with compassion and empathy to all humans, including those with diverse gender identities. In practice, this inclusive view encourages Muslims to respect the dignity and human rights of every individual, regardless of conformity to traditional gender norms.²² This shows that Islam has the capacity for dialogue and a deeper understanding of human diversity, including gender.

It is essential to recognise that all humans are born free and equal in dignity and rights. All human beings are also universal, interdependent, indivisible, and interconnected. Sexual orientation and gender identity are integral to every person's dignity and humanity and should not be a basis for discrimination or violence.²³

Today, progress has been made to ensure that all people of any sexual orientation and gender identity can live with equal dignity and respect according to their beliefs. Many countries have laws and legislation that guarantee the rights of equality and non-discrimination without distinction based on sex, sexual orientation or gender identity.²⁴

However, human rights violations directed against people because of their sexual orientation or gender identity are an ingrained global pattern that needs to be taken seriously.

¹⁷ Ibid

¹⁸ original character (male and female) that created by God

¹⁹ Quran 4:1

²⁰ Munadi Usman, "Lesbian Gay Biseksual and Transeksual (LGBT) Polemic in Indonesia: A Study of the Opinion of the Indonesian Ulama Council and the Liberal Islam Network (JIL)," *ISLÓMIYYÓT* 40, no. 2 (2018): 123-129, <https://doi.org/10.17576/islamiyyat-2018-4002-04>.

²¹ Islam is a religion that embodies peace and love for humans and the universe.

²² Mohamed Bin Ali, "Inclusivism and Religious Plurality: A Quranic Perspective," accessed May 10, 2024, <https://www.rsis.edu.sg/wp-content/uploads/2018/03/CO18039.pdf>.

²³ UNFPA, "Human Rights Principles", 2005, accessed May 10, 2024, <https://www.unfpa.org/resources/human-rights-principles>.

²⁴ "About LGBTI People and Human Rights," Office of the United Nations High Commissioner for Human Rights, accessed May 10, 2024, <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights>.

Such violations include cases of extrajudicial killings, torture and ill-treatment, sexual assault and rape, invasion of private property, arbitrary detention, denial of employment and educational opportunities, and severe discrimination in favour of other human rights. These violations are often compounded by the experience of different forms of violence, hatred, prejudice and exclusion, such as those based on race, age, religion, disability or economic, social and other status.²⁵

Recently, the international community has seen great strides toward gender equality and protection from violence in society, communities, and families. In addition, fundamental UN human rights law mechanisms have affirmed the obligation of all States to ensure the adequate protection of all persons from discrimination based on sexual orientation or gender identity. However, the international response to human rights violations based on sexual orientation and gender identity remains fragmented and inconsistent.²⁶

To address these shortcomings, a deepening understanding of the comprehensive management system of international human rights law and its application to issues of sexual orientation and gender identity is urgently needed to codify and clarify State obligations under existing international human rights law to promote and protect all human rights of all persons based on equality and non-discrimination.

On behalf of a coalition of human rights organisations, the International Commission of Jurists and the International Service for Human Rights have taken the initiative to develop a set of principles of international law on the applicability of international law to human rights violations based on sexual orientation and gender identity. This will bring greater clarity and relevance to States' human rights obligations.²⁷

Islamic Theological Foundations and Juridical Approaches to the Protection of LGBT Human Rights in Thailand

In Islamic history, the LGBT phenomenon has existed since the time of the Prophet Luth, when his people did a very taboo act, namely channelling sexual appetite to the same sex. Their behaviour is called sodomite. Moreover, Islam strictly prohibits it, as evidenced by the calamity revealed to the people of Prophet Luth at that time. Islam's view on LGBT can be explicitly found in the explanation of the hadith of the Prophet Muhammad PBUH. From Abi Musa, Rasulullah said, "*If a man comes to a man, both of them have committed adultery, and if a woman comes to a woman, both of them have committed adultery.*"²⁸ Islam recognises that humans have a desire for sexual relations, especially against the opposite sex.

Islam regulates this in an institution called marriage, as previously stated. Through marriage, human nature can be well preserved because marriage regulates sexual relations between men and women. With marriage being prescribed, Islam prohibits all forms of sexual relations outside of marriage. This is because it will lead to the chaos of biological relationships and can damage the bloodline and cause hostility and murder. Discussions about homosexuality or lesbians have always led to punishment for the perpetrators because the argument for its prohibition, according to fiqh experts, has been determined by the Qur'an as it was determined for the people of the prophet Luth.²⁹

²⁵ M. Tasrif, *Islam, LGBT & Hak Asasi Manusia: Telaah Implikasi Tindakan Nabi Muhammad SAW. Atas LGBT terhadap Wacana Kebebasan Seksual di Indonesia* (Po Press, 2016), 113.

²⁶ Human Rights Watch, "Thailand: Report Title," December 2021, accessed May 10, 2024, https://www.hrw.org/sites/default/files/media_2021/12/thailand1221_web.pdf.

²⁷ *Ibid*, page 117

²⁸ *Hadith Riwayat Al-Baihaqi*

²⁹ Quran 15:74-77

In Sahih Bukhari hadith number 5885, narrated by Ibn Abbas, he said, “*The Messenger of Allah cursed men who imitate women and women who imitate men.*”³⁰ Another basis is in Al-Mu'jam al-Awsat li al-Thabaraniy hadith number 6858, narrated from Abu Hurayrah, from the Prophet, who said: “*There are four groups who are always in the wrath of Allah in the morning and evening.*” I asked, “*Who are they, O Messenger of Allah?*” He replied, “*Men who resemble women, women who resemble men, people who go to animals, and men who go to men.*”³¹

Therefore, the Imams of the madhhab, except for Hanafi, stoned homosexuals or lesbians to death. The Hanafis are of the view that this is an immorality that Allah has not decreed, so it is punishable by b because it is not part of adultery. According to al-Iraqi, “*Men who resemble women in their gestures and speech are sometimes innate and not made up. The first group is not blameworthy. There is no sin or punishment. This is because he has an excuse that is not made up. The second group is despicable and is condemned in the saheeh hadiths.*”³² Al-Thabari said that “*one of the things that is not permissible for men is to resemble women in the mannerisms that are characteristic of women, including the way women behave on their bodies and the way women speak*”. Al-Nawawi said, “*It is correct that women resembling men and vice versa are haraam because there is a sahih hadith about it.*”³³

Al-Bahutiy al-Hanbali said that it is haraam to imitate men with women and vice versa, i.e. to imitate women with men in dress and other things such as speaking, walking and so on.³⁴ Ibn Hajar al-Haitamiy said that “*one of the 107 major sins is to resemble a man to a woman in the things that characterise women's habits, such as clothing, speaking style, body movements and so on and vice versa.*”³⁵ Al-Zahabi, in his book, “*al-Kabair, has included men who behave like women, women who behave like men, men who resemble women and vice versa, women who wear men's clothes and vice versa in the group of people who may be cursed in general.*”³⁶

Homosexual behaviour is contrary to human nature, destroys male characteristics, and deprives women of their rights. This act can ruin the order of society, and people no longer care about ethics, kindness and feelings.³⁷ Based on the Qur'an and hadith above, scholars agree that same-sex sexual activity is forbidden. Even homosexual or lesbian offenders can receive severe punishment up to the death penalty. Ibn Qayyim explained that the punishment for sodomy is following the law of Allah SWT. In this case, intercourse that is not allowed at all is more sinful than intercourse that is permitted under certain conditions. Therefore, the punishment must be aggravated.

Overall, the concept of Islamic theology produces an exclusionary view of LGBT. This interpretation departs from the understanding that LGBT behaviour is contrary to natural law and religious teachings. In contrast, the juridical approach in the context of contemporary

³⁰ Sahih Bukhari, hadith no. 5885, narrated by Ibn Abbas.

³¹ Al-Mu'jam al-Awsat li al-Thabarani, hadith no. 6858.

³² *Tharh al-Tatsrib fi Syarh al-Tarqrib*, vol. Juz. VIII, p. 114. Translated by Al Iraq. Beirut: Dar Ihya al-Turatsi al-Arabi, 1995.

³³ *Raudhah al-Thalibin*, vol. Juz. X, pp. 64, 90. Translated by Al-Nawawi. Al-Maktab al-Islami, n.d.

³⁴ Al-Bahutiy al-Hambali, *Kasyf al-Qanaa' an Matan al-Iqna'*, vol. Juz. I. Translated by Al-Bahutiy al-Hambali. Maktabah Syamilah, 2002.

³⁵ Ibnu Hajar al-Haitami, *al-Zawajir 'an I'tiraf al-Kabair*, vol. Juz. I, p. 165. Translated by Ibnu Hajar al-Haitami. Maktabah Syamilah, 2002.

³⁶ Al-Zahabi, trans., *Al-Kabair*, vol. Juz. I, p. 165 (2002), Maktabah Syamilah.

³⁷ Abū Abdillāh Aḥmad ibn Muḥammad ibn Ḥanbal ibn Hilāl ibn Asad Al-Syaibān, *Musnad al-Imām Aḥmad ibn Ḥanbal*, juz 5 (Beirut: Muassasah al-Risālah, 1421 H/2001 M), 225.

law shows a more progressive and adaptive tendency to social dynamics and community needs. This approach tries to find a balanced solution between religious principles and human rights, including considering society's social, psychological, and individual rights impacts.

In international legal instruments, LGBT rights have been universally accommodated in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The International Covenant on Civil and Political Rights (ICCPR) specifically adopts the guarantee of equality before the law and equal protection of the law without discrimination. As articulated in Article 26, "*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status.*"³⁸ This article affirms two fundamental aspects of ensuring that all persons are treated equally by the judicial and administrative bodies, thereby preventing arbitrary action.

It also affirms the equal protection of the law by placing a particular burden on states to adopt the necessary legislation to prohibit discrimination and ensure equal and adequate protection against discrimination on the enumerated grounds. Thus, the ICCPR explicitly recognises and protects the rights of individuals from the LGBT community to equal protection of the law and freedom from discrimination. This reflects international recognition of the importance of human rights and equality for all, including those from the LGBT community. These protections also emphasise the importance of member states taking the necessary legislative and administrative measures to ensure these rights are respected and protected in their national legal and policy practices.³⁹

Referring to the principles established by the ICCPR above, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) also plays a vital role in strengthening the international legal framework supporting LGBT rights. This is enshrined in Article 2, which mentions, "*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"⁴⁰ This article affirms that the state parties of the covenant ensure individuals' rights without discrimination based on race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth, or another status. Thus, countries that ratify the ICESCR must take concrete steps to ensure that all individuals within their jurisdiction can enjoy the economic, social, and cultural rights recognised by the Covenant without discrimination. These include the right to work, an adequate education, the right to enjoy an acceptable standard of health, and the right to participate in cultural life.

³⁸ Office of the High Commissioner for Human Rights, "International Covenant on Civil and Political Rights," 1966, accessed April 30, 2024, <https://www.ohchr.org/sites/default/files/ccpr.pdf>.

³⁹ Association for Progressive Communications (APC), "The Protection of Sources and Whistleblowers: Submission to the United Nations Special Rapporteur on the Right to Freedom of Opinion and Expression," June 29, 2015, accessed June 23, 2024, <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/Protection/AssociationProgressiveCommunications.pdf>.

⁴⁰ OHCHR, "International Covenant on Economic Social and Cultural Rights," OHCHR, 1966, accessed April 30, 2024, <https://www.ohchr.org/sites/default/files/cescr.pdf>.

In the context of LGBT rights, this article has important implications as it requires states to recognise and protect the rights of LGBT individuals in these aspects of life. States must ensure that LGBT individuals are not treated differently or discriminated against in access to employment, education, healthcare, and cultural activities. This also means that states should strive to remove legal and social barriers that may prevent LGBT individuals from thoroughly enjoying these rights. This commitment reflects the recognition that economic, social, and cultural rights are universal and should be enjoyed by all people without discrimination, a fundamental principle of international human rights law. Therefore, the ICESCR provides a legal framework that supports the complete integration and equality of LGBT individuals in society, strengthens their protection against discrimination, and supports broader social equality.⁴¹

In the context of international law and domestic legal reforms, Thailand has made substantial progress in integrating LGBT rights into its national legal framework. These reforms began in 1956 with the legalisation of same-sex activity, marking the country's first initiative in recognising and protecting the rights of LGBT individuals. Further progress was made in 2002 when changing medical and social views resulted in the declassification of homosexuality as a mental illness, reflecting the evolution of more inclusive social attitudes towards the LGBT community in 2005, Thailand's armed forces took another progressive step by lifting the ban on LGBT individuals serving in the military. This demonstrates the country's commitment to equality in public service. Thailand then launched a legislative initiative to recognise same-sex civil partnerships. If passed, this will equalise their legal rights with those of heterosexual couples, including in aspects of inheritance and joint property.⁴²

These reforms not only reflect the global trend towards broader recognition of LGBT rights but also demonstrate Thailand's position as a leader in Asia in terms of social inclusion. While challenges remain and space remains, these measures demonstrate Thailand's commitment to creating a more inclusive and egalitarian society for all its citizens, regardless of their sexual orientation or gender identity. These developments signal a transition from an exclusionary to a more inclusive and progressive view of LGBT rights in both international and domestic contexts. This progressive juridical approach balances religious norms and human rights by seeking solutions for harmonious coexistence. This approach also recognises that law is not static but must be responsive and adaptive to changing times and ongoing social dynamics.⁴³

There are two speculations when discussing the law. It consists of values and goals that underlie law formation in various contexts and legal systems. Some laws are binary, and some are inclusive due to differences in approach and philosophy behind the formation of the law. Binary laws tend to see everything in a black-and-white category, with a clear separation between right and wrong, halal and haram. This view is often found in religious law, such as Islamic law, which demands absolute adherence to religious teachings without tolerance for interpretations or inappropriate practices.⁴⁴ In contrast, inclusive law tends to accommodate the diversity, values, and different interests of various parties. This approach allows for dialogue, negotiation, and compromise between diverse perspectives, reflecting the spirit of

⁴¹ Ibid.

⁴² Kyle Knight and Sunai Phasuk, "Victory for Same-Sex Marriage in Thailand," *Human Rights Watch*, June 18, 2024, accessed June 23, 2024, <https://www.hrw.org/news/2024/06/18/victory-same-sex-marriage-thailand>.

⁴³ Ibid

⁴⁴ H. Suwardin, "Lesbian, Gay, Biseksual, Transgender (Lgbt) Perspektif Imam Syafi'i, Hukum Islam Dan Hukum Positif," *Jurnal*, Vol. XI, no. 2 (Desember 2018): 98-105.

inclusive global cooperation. International law often adopts an inclusive approach to achieve global harmony, justice, and order.

Efforts to realise the Process of Harmonisation of Human Rights and Islamic Law towards LGBT groups in Thailand

On the road to equality, Thailand has taken a significant step forward by passing the Gender Equality Act B.E 25. This law marks a legislative effort to recognise and protect the rights of the LGBT community, which has often been marginalised in legal and social discourse. While this law was a progressive step, public acceptance did not happen instantly. Many Thais still consider LGBT behaviour to be a form of deviation from social values and norms. This is because the existence of transgender people contradicts the norms and Buddhist teachings that guide the lives of the majority of Thai people.⁴⁵

Therefore, this kind of legislative change not only involves legal reform but also needs to consider the process of Thai society's acceptance of this policy. In line with this, Cortell and Davis (2000) introduced the concept of domestic cultural values, emphasising the importance of policies a country adopts to reflect ideas, frameworks, and assumptions that aim to gain public compliance. Furthermore, they reveal that policies accepted at the domestic level should be aligned with domestic norms, beliefs, understandings and obligations. In this case, the level of compliance depends on how well the policy relates to the values and standards held by the community.⁴⁶ If there is congruence between the policy and the values and standards of the society, then the policy will be easier to propagate, accept and reinforce through public policy. When there is cultural alignment between international and domestic norms, people naturally recognise and adhere to the policy, allowing for a smoother integration of the principles into everyday life. The legalisation of LGBT rights in Thailand has gained public support as it is perceived to reflect the values of equality and inclusiveness. Thai society gradually accepts gender and sexual orientation diversity as part of a plural society.

Highlighting the LGBT phenomenon in Thailand, the majority of scholars agree that the punishment for homosexual acts and lesbianism should be the same as that for adultery, namely stoning or flogging. However, in the Hanafi madhab, the punishment is left to the discretion of the local government. In general, Islamic law prescribes these punishments to create human beings as caliphs on earth.⁴⁷

In analysing the LGBT phenomenon in Thailand, scholars have mixed views. Most scholars think that homosexual acts and lesbianism should be subject to the same punishment as adultery, namely stoning or flogging, following the traditional interpretation of Islamic law. However, the Hanafi school gives local governments discretion to determine such punishments, suggesting there is room for interpretation and adaptation of Islamic law to changing social contexts. Islamic law prescribes these punishments to create responsible human beings who maintain balance and justice. Action in the Islamic view must be based on divine revelation, not merely on shifting social values. This confirms that assessing

⁴⁵ UNDP, *Being LGBT in Asia: Thailand Country Report* (Bangkok: UNDP, 2014), accessed June 23, 2024, https://2017-2020.usaid.gov/sites/default/files/documents/1861/Being_LGBT_in_Asia_Thailand_Country_Report.pdf.

⁴⁶ Cortell and Davis, "Understanding the Domestic Impact of International Norms: A Research Agenda," *International Studies Review* 2, no. 1 (2000): 65–87, accessed June 23, 2024, <http://www.jstor.org/stable/3186439>.

⁴⁷ Muhammad Sabilal Alif, *Analisis Pendapat Imam Abu Hanifah Mengenai Penentuan Kadar Hukuman Bagi Pelaku Liwath (Homoseksual) Dan Relevansinya Terhadap Fenomena Lgbt Di Indonesia* (Skripsi, Universitas Islam Negeri Kiai Haji Achmad Siddiq Jember, Fakultas Syariah, Program Studi Hukum Pidana Islam).

whether a behaviour is expected must be based on the essence of human creation to carry out the mandate as *Khalifah*.⁴⁸

In efforts to align the protection of LGBT rights in Thailand with Islamic law, it is crucial to recognise that Islam also prioritises respect for human rights. This includes the right to freedom of religion and protection from discrimination. This approach that respects human rights can help create a more inclusive consensus, which can accommodate the diversity and uniqueness of local communities while maintaining the basic principles of Islam.

Imam Ibrahim ibn Musa Abu Ishaq al-Shatibi in *Al-Muwafaqat fi Usul al-Shari'a* states that human rights according to Islamic law are divided into two categories, namely *Huququallah*⁴⁹ and *Huququl Ibad*.⁵⁰ *Huququallah* emphasises the obligation of each individual to believe in Allah SWT, including in worship and respect. *Huququl Ibad*, on the other hand, includes rights related to human relations. *Huququl Ibad* is further divided based on its foundation and nature. First, legal rights are rights that a state can regulate. This includes fundamental rights such as life, freedom of religion, and protection from discrimination. Second, moral rights include aspects not directly enforced by the state. However, they are nonetheless respected in Islamic law, such as honesty and integrity, essential for creating a just and dignified society. Although different in terms of enforcement, both play a crucial role in building a solid foundation for a harmonious Islamic society.

It reviewed the Maqashid al-shari'ah Imam Abu Ishaq al-Shatibi framework and identified five fundamental human rights principles in *Al-Dloruriyat al-Khomsah*. The first principle, *Hifdzu al-din*, affirms the right to religion and worship as a fundamental right of every individual. In this case, religious freedom is respected, which allows everyone to choose and practice their faith without coercion. This reflects Islam's commitment to tolerance, freedom of belief, and essential human rights. Second, *Hifdzu al-Nafs wa al-ird* is a critical foundation for ethics and morals. This principle emphasises the protection of the life and honour of every individual. This includes guaranteeing that everyone has the fundamental right to live safely, without any threat or harassment, and ensuring everyone's honour and dignity are safeguarded and not denigrated by any act.⁵¹

Furthermore, the principle of *Hifdzu al-Aql* focuses on the concept of mind preservation. This principle supports the right of every individual to use their intellect wisely in avoiding actions that can eliminate the intellect or damage the mentality. Moving on to *Hifdzu al-Nasl*, this principle underlines the right of individuals to form families and have offspring. This right includes the freedom to marry and have children, as well as the responsibility to ensure the protection and welfare of the family. Islam respects the institution of family and instils the values of responsibility in the roles of parents and spouses, which are essential pillars in the social structure. Finally, *Hifdzu al-mal* emphasises the importance of the right to property as part of human rights. This right includes the freedom to acquire property lawfully and legitimately by the law and morals. Not only that, this principle also emphasises the importance of securing and managing property as well as possible. Taken together, these five principles form the foundation for the Islamic understanding of human rights, which aims to create an order of society that upholds the respect of the individual for

⁴⁸ creatures that God will create on earth to replace the creatures that existed before (human)

⁴⁹ Rights of God

⁵⁰ Al-Shatibi, I. (2011). *The Reconciliation of the Fundamentals of Islamic Law*. Garnet Publishing. Page 109

⁵¹ Al-Shatibi, I. (2011). *The Reconciliation of the Fundamentals of Islamic Law*. Garnet Publishing. Page 109

the individual, the individual for the community, the community for the community, the community for the state and the religious community for other religious communities.⁵²

Harmonising the legalisation of LGBT rights and Islamic values contributes significantly to creating an environment that respects individual rights. To achieve broad consensus, constructive dialogue involving all parties is essential. The LGBT community, religious leaders, human rights activists, and policymakers must participate in this dialogue. This dialogue can bridge the differences in views on Islamic law and human rights and find common ground that respects human rights and religious values. The involvement of all parties in constructive dialogue will strengthen mutual understanding. In addition, cooperation between government institutions, non-government organisations, religious communities, and civil society groups is crucial. Integrating diverse perspectives will help create an inclusive environment that respects the rights of everyone, including the LGBT community.⁵³ Through this holistic approach, positive changes towards accepting and protecting LGBT rights can occur in Thailand.

By considering legal, social, and religious aspects, Thailand can more easily resolve conflicts and reach a consensus. Although challenges remain, steps taken by the Thai government have paved the way for broader discussions about equality and inclusion. Overall, efforts to align the protection of LGBT rights with religious values and human rights demonstrate significant progress toward equality and inclusivity. This is a critical step in ensuring that individuals' rights are respected and protected, regardless of their sexual orientation or gender identity.

Conclusion

Based on the discussion above, it can be concluded that the relationship between Islamic law and LGBT is multifaceted and contentious. In Islamic jurisprudence, LGBT issues are approached from various angles, with Islam categorising LGBT behaviour as "*haram*" (forbidden) and considering it a severe transgression. The term "LGBT" encompasses a broad spectrum of orientations and behaviours, including homosexuality, lesbianism, bisexuality, and transgenderism. Each of these categories carries specific implications and prohibitions within Islamic teachings. Conversely, in Thailand, the legal landscape regarding LGBT rights is more permissive. Thailand has decriminalised sexual activities such as homosexuality and lesbianism. Thai law does not prohibit discrimination based on sexual orientation or gender identity, signalling legal acceptance of the LGBT community. Furthermore, Thailand has made strides in recognising LGBT rights, particularly concerning same-sex marriage. Nevertheless, scholarly debates persist, especially regarding religious values. While Islamic law takes a firm stance against LGBT behaviour, discussions around tolerance and human rights reveal diverse perspectives. Some advocate for the acceptance and visibility of LGBT individuals, while others prioritise maintaining traditional values and moral standards.

⁵² *ibid*

⁵³ A. Fauziah, S. Samiyono, and F. Khairiyati, "Perilaku Lesbian Gay Biseksual Dan Transgender (Lgbt) Dalam Perspektif Hak Azasi Manusia," *Jurnal Surya Kencana Satu : Dinamika Masalah Hukum dan Keadilan* 11, no. 2 (2020): 151-162.

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