



# BISEXUAL ORIENTATION, DIVORCE, AND ISLAMIC LAW IN INDONESIA: LEGAL STANDING AND ARGUMENTS

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**Abstrak:** Apakah orientasi biseksual dalam suatu ikatan perkawinan dapat dijadikan sebagai dalil hukum untuk merumuskan suatu putusan di pengadilan? Apakah ia memiliki kedudukan hukum tertentu yang disebutkan secara langsung dalam peraturan apa pun yang mencakup masalah hukum privat Islam? Dalam menjawab kedua pertanyaan tersebut, artikel ini menerapkan penelitian yuridis-normatif yang mengkaji berbagai kemungkinan rasional dalam mengembangkan argumentasi hukum. Artikel ini menemukan bahwa dalam menangani kasus orientasi biseksual, sistem hukum Indonesia masih mengalami kekosongan hukum. Akibatnya, seolah-olah tidak bisa menjadi argumentasi hukum langsung karena tidak memiliki *legal standing*. Artikel ini berargumentasi bahwa tidak ada satu pun instrumen hukum yang diberlakukan yang secara eksplisit menyebutkan kasus orientasi tersebut. Namun demikian, hakim dapat menerapkan analogi kemungkinan “perzinahan yang berujung pada konflik yang tidak terselesaikan” untuk membuat rasio logis perceraian karena orientasinya.

**Kata kunci:** orientasi biseksual; LGBTQ; perceraian; hukum Islam; Kompilasi Hukum Islam, hak asasi manusia; *legal standing*; argumen hukum

**Abstract:** Can the bisexual orientation in a marriage bond be considered a legal argument for formulating a verdict in the Indonesia Islamic courts? Does it have such a specific legal standing mentioned directly within any regulation covering the issue of Islamic private law? In answering both these questions, this article implements a normative-juridical inquiry that examines various rational possibilities in developing arguments of law. This article finds that in handling the case of bisexual orientation, the Indonesian legal system has remained a legal vacuum. Consequently, it seems it might not be a direct legal argument because it has no legal standing. This article argues that there is no single legal instrument has been imposed that explicitly mentions the case of the orientation. However, the judge may implement the analogous of the possibility of "adultery that leads to unresolved conflicts" to make a *ratio legis* of divorce due to the orientation.

**Keywords:** bisexual orientation; LGBTQ; divorce; Islamic law; Islamic Law Compilation, human rights; legal standing; legal argument

## Introduction

Bisexual orientation has emerged in Indonesia for approximately the last two decades. It – and other directions such as lesbian, gay, bisexual, transgender, and queer (so-called LGBTQ) – has invited public debates due to its contributions to 78% of the increasing spread of sexually transmitted diseases, including HIV-AIDS (*Human Immunodeficiency Virus- Acquired Immune Deficiency Syndrome*) (Mulyadi et al., 2021). It has been argued that LGBTQ individuals have tended to be more vulnerable to engage with infectious diseases (Muttaqin, 2017). Their medical problems tend to affect their social and marital relations.

It has been believed that the bisexual orientation has contributed to undermining the survival value of marriage. Other than the emergence of the medical problem, it seems to lead to religious and social problems. It has been argued that while some religious perspectives forbid the orientation, society insists on cavil at anyone committing it. In a normative way of marital relations, a wife is only allowed to have such sexual orientation and connection to her husband or otherwise. In the larger context of Indonesia, the denial of this normativity may disturb the social order and the nation's moral principles. It has been claimed, "insult" the first chapter (*sila*) of Pancasila, "Oneness of God" (*Ketuhanan Yang Maha Esa*). The good citizen must hold firmly to the fundamental principles of Pancasila. Consequently, anyone in the country who believes in God and respects the principles is highly likely to reject the inappropriate sexual orientation (Kamalludin et al., 2018).

Although the orientation tends to be problematic, its supporters (and those who commit to the LGBTQ) have struggled for their existence and get the public attention. They have taken the issue of human rights and humanity to express their thoughts and inclination to gain legal support and protection (Muttaqin, 2017). They have argued that the international human rights law (especially the Universal Declaration of Human Rights/UDHR) protects their rights of sexual orientation. Furthermore, in the context of Indonesia, it is a fact that this international instrument has been ratified in Law No. 39/1999 on Human Rights. However, the rights and individuals' freedom regarding a particular sexual orientation must be consistent with morality, religious

values, and social virtues (Yansyah & Rahayu, 2018). From the legal perspective, even though the (protocol) state is the duty bearer in respecting, protecting, and fulfilling the individual rights of the citizen, it stands in the middle of international and domestic law. In other words, it has been the duty bearer of law enforcement and the bridge of legal and political relations. The political entity must deal with the global community's law on one side and the social order within the country on the other (Syafi'ie, 2012).

It is an uneasy task to deal with the middle position. It is whether the state must embrace the international law principle of "*lex superior derogat legi inferiori*" (the international law is higher and superior to the law that has ruled domestically) or not. However, the state's reconsideration of implementing the principle does not mean that it undermines the rule of the global order. It means that in the case of particular sexual orientation and marriage (supported by human rights regulation), the state grasps the essentials of moral and religious values (Harahap, 2016). Indonesia is subjected to respect for its wisdom, consisting of socio-religious and cultural diversity and virtues. It has affirmed the concept of "margin of appreciation" to contextualize the common international principle of the human rights law taking a higher position than the domestic law (Bjorge, 2015; Ulfstein, 2017).

The objective of contextualizing the standard international principle through a margin of appreciation has been driven by the state, religion, and women's interests (Mubarok, 2012). The state attempts to protect the rights of its citizens and women while still maintaining the importance of religion, tradition, and culture (the essential elements of national integration). Based on the historical inquiry, it can be found the apparent evidence that the affirmation of dealing with the middle position taken by the state seems to be the best choice mainly to maintain the elements of societal integration. When the colonial administration tried to apply such foreign legal instruments, they never confronted the local tradition or customary law. Consequently, the Dutch colonial ruler had imposed "the Compendium Freijer" in 1760, covering the marriage and inheritance law which must obey Islamic law (Idri, 2009). In 1823, the Religious Courts of Palembang were established. It had been responsible for adjudicating any case of marriage, divorce, inheritance, custody, wills, and others under the umbrella of Islamic law (Mubarok, 2012).

However, its practical implementation in the colonial era is not without problems. It is mainly because there are two entities of law – religious law (sharia) and customary law (*adat*) – presumably considered as being contradictory, although some scholars reject the contradiction (Mubarok, 2012). Due to the historical implementation of Islamic law, Law No. 1 of 1974 on Marriage Law was established (Azra, 2003). It is the starting point that Islamic law has been enforced officially and is considered the state's law covers the case of Muslims' private affairs (marriage). Indeed, there is no contradiction between Law No. 9/1999 (the ratified UDHR) and Law No. 1/1974. The latter legal instrument tends to specialize in the former (*lex specialis derogat legi generali*). Accordingly, regarding the issue of marriage and the case of a particular sexual orientation, one has had her/his rights. However, her/his rights have been limited by and must not challenge the normativity of "the latter instrument." Article 1 of the instrument states, "...Marriage is an inner and outer bond between a man and a woman whose goal is to achieve a happy family."

Consequently, marriage with a bisexual orientation and its risks has been claimed to deny the fundamental goal of establishing a happy family. In this case, the instrument is a legal representative of Islamic law in the specific field. According to the Islamic legal opinion (*fatwa*) issued by Majelis Ulama Indonesia (the state-based fatwa makers/MUI), the orientation is forbidden (*harām*) due to its harmful and dangerous impacts and also prohibited by the Scripture (Ermayani, 2017). Furthermore, along with the Kamalludin's claim, according to the Islamic legal thought, referring to the Quran Surah Hūd verses 82-83, bisexual orientation is a deviation (Kamalludin et al., 2018). In addition, argues that marriage is only allowed for a couple: a man and woman (Supraningsih, 239; Tahir et al., 2017). Moreover, Ermayani argues that the orientation opposes the objective of national education as it is highlighted in Article 3, Law No. 20/2003 that, "...education aims to build the national character emphasizes the essentials of good deeds, creativity, noble knowledge and piety to God (Ermayani, 2017).

However, in the process of making the legal verdict of the case of divorce in the court, it is not as easy as implementing Article 1 of Law No. 1/1974. The legal argument formulated must be strengthened by

other rationalizations. Referring to Article 39 (2) of Law No. 1/1974 (the legal explanation of the law, Article 39 (a)) and Article 19 (a) of Regulation No. 9/1975), divorce is being allowed based on the rationale that one of those who are bound legally by marriage (wife or husband) involves in adultery. According to Article 284 of the Indonesian Criminal Law (KUHP), adultery is sexual intercourse between a married man or woman (Huda, 2015). According to Islamic law, adultery occurs due to the sexual activity between a man and woman, although they have not been married yet (Huda, 2015). Based on this adultery argument, bisexual orientation within a marital bond seems to be challenging to avoid deviant behavior. It potentially leads to conflicts that destroy a marriage (based on Article 39 (2) of Law No. 1/1974, Article 19 (f) of Regulation jo. Article 116 of the Islamic Law Compilation/KHI). However, the argument is not strong enough, or at least, there is no more precise legal explanation mentioning that bisexual orientation might be directly considered as legal argument for divorce. This situation leads to the so-called legal vacuum (*recht vacuum*).

The legal verdicts made by the judges consist of chronological explanations conditioning the case of divorce. For instance, the Palangkaraya Religious Court Verdict No. 78/Pdt.G/2021/PA.Polk and the Gorontalo Religious Court Verdict No. 0447/PDT.G/2014/PA.Glo cover explanations of the case of bisexual orientation as a factor of conflicts within marital bonds. However, the orientation is not the referential inclusion part of any legal instrument that has been imposed. This article argues that bisexual orientation might not be a legal standing of constituting a verdict because it is not directly mentioned within any legal instrument imposed regarding the case of Islamic private law (*al-ahwal al-shakhsyiyah*), especially marriage and divorce. Consequently, in order to solve the case of bisexual orientation in marriage and divorce, the judge might implement Article 39 (2) (its official explanation, point a) of Law No. 1/1974, Article 19 (a) and (f) of Regulation No. 9/1975 jo. Article 116 (a) and (f) of the KHI. They state "adultery and unresolved conflict" as the legal rationale of divorce in the court since the orientation within a bond of marriage is highly likely to commit in adultery and it leads to dangerous circumstances for the bond itself.

## **Bisexual Orientation and Its Legal Standing in the Islamic Legal System in Indonesia**

While mentioning the Islamic legal system in Indonesia, it depicts how "Islamic private law" (*al-ahwal al-shakhsyyah*) has been imposed. It includes some regulations such as Law No. 1/1974, Regulation No. 9/1975, and KHI, and also the legal system of the court and its administration. In the process of making law, a judge aims to adjudicate a particular verdict that is pro-Justitia. In this process, the verdict has to have such legal arguments and materials of specific regulations. To solve a particular case, sometimes relevant regulation might be used because the case has a unique legal standing. Having an exceptional legal standing means that the case is mentioned in the regulation. In the case of bisexual orientation put as a legal argument for permitting divorce, it has been argued that it has not been supported yet by any relevant regulation. Furthermore, none of the regulations directly mention the problem of sexual orientation that might lead to the basis of divorce.

When a judge refers Article 39 (2) (its official explanation, point a) of Law No. 1/1974, the Article 19 (a) of Regulation No. 9/1975, and Article 116 (a) of the KHI, it is evident that "...one of the reasons of divorce is an adultery." Undoubtedly, adultery is not a bisexual orientation. Adultery is mentioned in the Indonesian Penal Code (KUHP) and is defined as sexual activity between a "marriage" man and woman (one of them might not be in a marital relation) (Huda, 2015). Bisexual is different from adultery. Bisexual orientation is a sexual impulse of a man and woman to his or her partner (Ermayani, 2017). As mentioned before, in the case of adultery, while the sexual activity may be occurred between a man and woman, in the case of bisexual orientation, it involves homosexual and/or lesbian activities. The latter may highly potentially encourage the emergence of conflicts within a marital relationship. The societal perception that committing the bisexual orientation is a kind of digression further complicates it. Indeed, it is against the country's moral backdrop of religious society.

Due to the former is not the latter, it is not without credible evidence that the orientation has no legal standing. For some previous cases, judges have imposed other arguments such as persistent conflicts

within a marriage. Consequently, the case has led to the *recht vacuum*, especially in the private law of the religious court of Muslims in the country.

### **The Selected Evidence**

There are two important cases of issuing the divorce verdict due to bisexual orientation, although the orientation has no any legal standing. The first is the Palangkaraya Religious Court Verdict No. 78/Pdt.G/2021/PA.Polk and the second is the Gorontalo Religious Court Verdict No. 0447/PDT.G/2014/PA.Go. The former covers the case of divorce proposed by a husband to his wife due to the frequent conflicts and economic problems, but he does not apply the pronouncement that he is gay despite the fact his wife is sixth-month pregnant. The latter does not represent a divorce proposed by a wife to her husband due to the sexual orientation that her husband has, although they have two children. The divorce has been decided based on the perpetual conflicts within their marital relation.

Both cases have focused on the conflicts within their marital relations. The focus is the most possible legal argument that would be accepted in the court as the primary rationale of divorce. It has have a solid legal standing and being mentioned at Article 39 (2) (its official explanation, point f) of Law No. 1/1974 and Article 19 (f) of the Regulation No. 9/1975 that "...divorce is being allowed due to the frequent conflicts have happened, and both sides of wife and husband find them difficult to be reconciled". This regulation is consistent with Article 116 (f) of the KHI with similar disclosure. In addition, the argument of highlighting the sexual orientation seems impossible to implement because when one (either wife or husband) has proposed a case of divorce, he or she must uncover such undeniable evidence in the court. As a result, the evidence follows the flow of the proposed argument, and one who argues is responsible for proving. The fact of the wife's pregnancy or having children would be a counter-argument that weakens the claim of bisexual orientation. Consequently, it strongly influenced the judge's perception in deciding the case.

Thus, it is evident that bisexual orientation is not the direct cause of divorce in court. It must be supported by any argument that has been rigorously mentioned in various legal instruments.



## The *Ratio Legis* of Adultery and Bisexual Orientation

In general, Indonesia does not legally allow same-sex marriage as well as for those who have committed the bisexual orientation, while the United States of America, to some extent, have allowed it since 26 June 2015 (Suherry & Mandala, 2016). In Indonesia, according to Law No. 1/1974, marriage is understood as the marital relation between man and woman aiming to build a happy family based on the religious principle. Consequently, either same-sex marriage or various kinds of it is strongly forbidden by the Law (Suherry & Mandala, 2016). It is understandable since Indonesia itself is neither totally a religious nor a secular state. It means that in the middle position, based on the Pancasila norms, Indonesia respects the importance of the ethical values of religion.

Based on the ethical values of Islam, referring to the Prophetic tradition of Muhammad PUBH, any kind of sexual deviation is forbidden. The main reason of this strict prohibition is the fact that it can destroy Islamic morality (*akhlāq*). As recorded in the *Kitāb Sunan Ibn Mājah* No. 2562, the Prophet stated in his hadith that "Those who deal with any act like the Loth people (Sodom), they must be killed" (Suherry & Mandala, 2016). A further explanation of this specific punishment is mentioned in the Islamic criminal law (*jināyah*). This study does not come into contact with discussion on this topic of criminal law in Islamic tradition. It covers only the case of bisexual orientation as a reason in the divorce process.

Considering their negative impacts, both the concept of adultery and bisexuality have the same legal concerns (*ratio legis*). First, the definition of adultery according to Article 284 of the KUHP is intercourse between a man and a woman who have been bound by marriage with a man or woman who is not his wife or her husband. Sexual intercourse in this part means a sexual combination between male and female genitalia, such as procedures for obtaining children and the discharge of semen (Huda, 2015). Meanwhile, bisexuality is the biological and sexual desire of a man or woman towards his or her opposite and same-sex (Ermayani, 2017). In the context of marriage, a person with a bisexual orientation can have a relationship with a husband or wife simultaneously with someone who is not his or her legal partner, be it a man or a woman. Thus, in this part, "having

unlawfully sexual and biological desires" is a common thread between adultery and sexual relations with a bisexual orientation.

Article 2 of the KHI states, "Marriage is the sacred and strong contract (*mīthāqan ghalīẓan*) as described in the Quran Surah al-Nisā' Verse 21." Second, both adultery and bisexual orientation can be categorized as acts that injure the sacred value of marriage. Third, sexual needs are rights and obligations between husband and wife. When the needs are not fulfilled properly, they will lead to new conflicts that can lead to divorce. According to a study conducted by Balkanlıoğlu in 2013, religious values are the source of solutions to domestic conflicts, so religiosity contributes to reaching harmony between husband and wife (Istiqomah & Mukhlis, 2015). Fourth, some argue that bisexuality is an act against human nature. Generally, based on the Islamic law doctrine, it can be argued that Allah created males and females to be partners in harmony. Furthermore, He (Allah) made women as human beings who are able to reproduce biologically, meaning that only women can give birth and breastfeed.

### **Further Problem: *Lex Superior Derogat Legi Inferiori* Versus a Margin of Appreciation?**

Although the judge has dealt with a way of solving the problem of constituting a divorce verdict in the case of bisexual orientation within a marital relation, the issue of *recht vacuum* has remained intact due to fragile interactions between two of international law principles (a margin of appreciation and *lex superior derogat legi inferiori*). The special case of bisexual orientation has become an intersection point of two legal entities: international law and sharia. Sharia is often said to conflict with human rights, but these entities have often been complementary. The orientation has evolved along with the widespread implementation of international human rights law. In the context of Indonesia, which has ratified almost all international human rights instruments, the orientation counts for the critical challenge of the practice of sharia.

Those who have supported human rights tend to believe that human rights protect the bisexual orientation. However, from the perspective of the Muslim private law in Indonesia (sharia), the orientation is categorized as *ḥarām* (forbidden). In this point, it seems

that international law has been contradictory to domestic (sharia) law. Legal commentaries of this case have been classified into two parts: the domestic law must be subject to the higher law, and the higher law must adapt to the domestic one.

Yet, instead of perceiving this case from a contradictory view, it is more functional to elaborate on each other from the perspective of harmony. It means there is no contradiction between human rights and sharia law or the principle of *lex superior derogat legi inferiori* and a margin of appreciation. It is because, regarding human rights, various values of sharia concern the essentials of freedom and humanity. In addition, Islamic law respects the importance of human rights, human dignity and humanity. In short, as Abdullah Saeed, Jasser Auda, Tariq Ramadan, and Khaled Abou El Fadl argue for, human rights are compatible with sharia. Consequently, in respecting human rights, Indonesia has ratified various international instruments and even within its constitution, the fundamental instrument of the Universal Declaration of Human Rights (UDHR) is internalized substantially. Meanwhile, sharia has been imposed since long time ago through the establishment of religious courts and the development of domestic "Islamic" law. Thus, there is no so-called contradiction between these two different laws.

People who have committed to bisexual orientation have their fundamental rights. In implementing human rights law, however, the state must not violate the people's rights, although these rights have been strictly limited by the cultural virtues (as well as the religious values). Accordingly, due to the limitation, applying the principle of *lex superior derogat legi inferiori* seems to be specified by the principle of *lex specialis derogat legi generali*. The specialization in this part is the functionality of the limitation. Consequently, in dealing with the prohibition of the practice of bisexual orientation within the marital bond by domestic "Islamic" law, it is not contrary to human rights. It is indeed that people with bisexual orientation still have their fundamental rights, primarily the right to life. However, they have no access to legalize their orientation within a legal marital relation.

In this case, this article argues that implementing the principles of a margin of appreciation based on religious values and law does not overcome the superiority of international law but specializes it.

However, for the particular case of bisexual orientation within a family bond as a legal argument of divorce, it has no such legal standing. Accordingly, it has urged for the presence of a legal vacuum. It means that, although in the level of the principle of the implementation of international and domestic law, the case has been resolved, practically, it has persisted in having no legal standing. Thus, it seems to urge a legal reform to solve the systemic problem comprehensively.

### **The *Recht Vacuum* and the Agenda of Legal Reform**

The legal reform due to the special case of bisexual orientation as a rationale of divorce is crucial. It means, the judge would constitute such legal arguments which tend to exclude the main problem. When there is no any kind of legal instruments mentioning this case, it has remained in the absence of legal standing.

### **The Need for a Legal Reform**

The development of the Muslim private law in Indonesia closely relates to the notion of modernization of law. It is as argued by Philippe Nonet dan Philip Selznick. In their publication, "Law and Society in Transition to Word Responsive Law" (1978), they have classified the law into three functional means (Nonet & Selznick, 2017). First, law as a tool of political power which is coercive and oppressive (repressive law). Second, law as an autonomous institution of controlling repression (autonomous law). Third, law as an instrument of social democratization (responsive law). Each of these three functional means of law is abstract and it has its own advantages. Yet, Nonet and Selznick state that the development of law tends to move from the repressive one toward the responsive (ideal) (Nonet & Selznick, 2017).

In its development, the law is not only established by the people, from the people, and for the people, as William Evan asserts, but it aims to transform societal morality, behavior, and tradition (Evan, 1990). It is not against Evan's assertion. Lawrence M. Friedman observes the social effect of law and argues that the law has functionally shaped and conditioned society, although it is not always in an ideal situation (Friedman, 2005). Hence, although the development of law will be ideal, the reality shows its various imperfections.

The need for legal reform in the context of the Muslim private law in Indonesia has a similar situation that Evan and Freidman identify. It is based on an Islamic legal maxim "When there is no one being able to achieve a perfection, it is no need to undermine it" (*mā lā yudraku kulluhu lā yutraku kulluhu*) (Setiawan, 2014). Due to the changing realities, the law must progressively transform into the ideal and aim to solve the current social problems. There is no such perfect conceptualization of law and its implementation, but it does not mean that the reform project is unimportant.

### **Towards the Responsive Law**

In dealing with the specific context of the absence of legal standing for the case of bisexual orientation within a marital bond, it is critical to realize a certain legal reform. The state-made law has been influenced and has influenced society. Its primary purpose is to ensure the advancement of social order, and therefore, it can guarantee the social transformation towards the ideal situation. The situation means the ability of the law to solve the current problem that society has (Kharlie, 2019). Accordingly, the law has transformed to become more responsive.

It has been argued that certain legal reform is the key point of society's development through legal modernization (legal reform). Because of the growth of the issues and practices of LGBTQ, the law – especially the Muslim private law in Indonesia –requires to be a part of the project of reform. It aims to ensure the Muslim social order is in line with the state principles of Pancasila and religious norms of Islam.

However, the project of reform and modernization is not without problems and challenges. Due to the development of the state, some claim that some people tend to ignore the essentials of religious norms. In this context, some others tend to be confused with what are the fundamental values that they must follow, although it is obvious that the people of the country must be aware of Pancasila (Kharlie, 2019). In order to undertake the problem of "moral" uncertainty and, in turn, the problem of legal ambiguity, it needs to be considered to reform all of or a part of the law to face current challenging realities of society (Soekanto, 2014). Although the reform is not an easy task, it should be confirmed to be successful, and it must involve the process of in-depth

and critical evaluations (Soekanto, 2014). Hence, the project of reform is important to be endeavored based on the needs of the society.

### **A Project of Legal Reform**

In the first instance of modernization of law, the state reformed the minimum age of marriage for women is from 16 to 19 years old. It is stated in Law No. 19/2019. It is indeed, the reform itself does not come from the emptiness of the context (Soekanto, 2014). Certain various factors have conditioned the situation as well as the spread of popular ideas of gender equality and human rights. Another instance of modernization is the requirement of registering marriage as mentioned in Law No. 1/1974, Article 2 (2), which aims to protect society. When the reform has been accomplished, the law must be imposed practically by authoritative institutions, and the society has the rights to take control of the perfection of the legal implementation.

The reform of legal arguments for divorce has been stated in Regulation No. 9/1975. The regulation is necessarily changed (*mutatis mutandis*) by the KHI, especially in Article 116 (g). The legal arguments of divorce are: one of the wife and/or husband commits in adultery, drunkards, compactors, gamblers and others who are difficult to cure; irresponsibly has left for two years in a row without any permission or any reasonable explanation that is out of his or her ability; has been imprisoned for five or more years; commits in a crime of cruelty or serious mistreatment that endangers another; has a physical disability or disease that results in being unable to carry out his or her obligations as husband or wife; constantly has disputes and quarrels and no hope of living in harmony within a marital bond; (based on Article 116 (g) of KHI) violates the Islamic marriage agreement (*taklik talak*) and has converted his or her religion or believe that leads to disharmony. These legal arguments of divorce have not covered the case of bisexual orientation. Yet, is it possible to add bisexual orientation (and the inclusion of the LGBTQ orientations) to be the new legal argument for divorce?

Based on the data of the Ministry of Health of the Republic of Indonesia, the HIV-AIDS has increased volatily, and one of the significant factors supporting this increase is LGBTQ (Kementrian Kesehatan Republik Indonesia, 2020). From this data, 17% of the

global distribution comes from the same-sex marriage among men (Kementrian Kesehatan Republik Indonesia, 2020). At the same time, for the last decade, the number of divorces has risen from 5,89% (2.9 million) to 6,4% (4.7 million) (Maharrani, 2021). In the last year of the decade (2020), the main factor causing divorce is perpetual conflicts within a marital bond (176.7 thousand of cases) (Jayani, 2021). This factor also counts for the factor LGBTQ orientation. Accordingly, the orientation contributes to the growing HIV-AIDS, the number of conflicts, and then the divorce. Mentioning LGBTQ as a reasonable argument for divorce in the regulation is based on the needs of society. This project can potentially reduce the legal uncertainty and resolve the *recht vacuum*.

To resolve the problem of the vacuum of law, modernization and legal reform must be undertaken to transform certain regulations. In this part, the law is clothes of society whose size must be fixed contextually along with the needs of the society (Setiawan, 2014). The law and regulations must be good for the public and shape the welfare of every family in the country (Mulyawan et al., 2021). While social patterns, relations, and orders have changed dynamically, the law must also be contextualized. From the perspective of Islamic law, it can be argued that the law is changing due to the changes in time and place, both practically and normatively (*lā yunkaru taghayyaru al-ahkām bi taghayyuri al-azmān*) (Mulyawan et al., 2021).

## **Bisexual Orientation and Human Rights**

According to Mahfud MD, human rights are inherent in humans who are born naturally as a gift from God, not from humans or the state (Santoso, 2016). Furthermore, Leach Levin as a human rights activist states that human rights are "non-derogable" that aims to protect human dignity (natural rights). Human rights are constituted from the national and international processes (Santoso, 2016). To explain the specific aims of human rights – instead of their general aim of protecting human dignity – John Rawls highlights that human rights have three trajectories of defending justice: as the principle of greatest equal liberty (political and religious freedom), principle of difference (cultural freedom) and the principle of fair equality of opportunity (social and economic freedom) (Santoso, 2016). All of these aims

have been accommodated within a fundamental instrument of the Universal Declaration of Human Rights (UDHR), which was signed in 1948. In the context of the existence of people having LGBTQ orientation, they have been protected by human rights (Yansyah & Rahayu, 2018). Article 16 of the UDHR states, "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights to marriage, during marriage and at its dissolution." Some have believed that this article implicitly covers the different sexual orientations that are protected as well.

Not only their rights to marriage that are protected, but also to speak and express their thought and conscience. It is guaranteed by Article 18 and 19 of the UDHR. It has been assumed that due to the protection of human rights, the human freedom that can be accessed is without limitations. In fact, it is not, however. It is because based on Article 29, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Article 19(3) of the ICCPR permits limitations which are "(1) provided by law and (2) necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals." Indonesia, the Undang-Undang Dasar 1945 (Indonesian Constitution), and the UDHR, as it is ratified in Law No. 39/1999, must be subject to Pancasila as the state principles (Yansyah & Rahayu, 2018).

Indonesian law has its perspective in implementing human rights to the specific case of LGBTQ in the marriage law. On the one hand, LGBTQ is internally engaged with the private matter of the individual. Article 17 of ICCPR protects the rights of any individual who has committed in LGBTQ, and no one – with the inclusion of the state or its apparatus – can neither interrupt nor disturb her or his rights, private matters, and dignity (Baderin, 2003). Yet, her or his rights, according to Article 28J (2) of the UUD 1945 can be limited due to contradicting moral considerations, religious values, social order, and harmony within the democratic state of Indonesia (Sofyarto, 2017). Accordingly, while the LGBT tends to bother these



Indonesian norms, they should be avoided and forbidden to implement in the marriage law. It is also practiced in contrast to Law No. 1/1974 (Muzakkir, 2021). Because the concept of gender in the system of Indonesian marriage law only recognizes "man and woman marital relation" and not other combinations (Fauziah et al., 2020). As it has been discussed before, this limitation seems to violate human rights, but it does not. At the level of implementation of the fulfillment of human rights in the country, the limitation is legally allowed (Sofyarto, 2017). Although the limitation has been imposed, the non-derogable rights of individuals committing the LGBT cannot be violated and discriminated (Manik et al., 2021).

### **LGBTQ in the Perspective of Islamic Law and Islamic Human Rights**

From various versions of the school of thought and jurisprudence, Islamic law puts man and woman as a perfect combination to form a couple of marital relation (QS Al-Nisā' 1), aiming to achieve serenity, happiness, and blessedness (*sakīnah, mawaddah, wa rahmah*) (QS Al-Rūm 21). Both (man and woman) are responsible for protecting their dignity and must avoid any wrong acts forbidden by religion (QS al-Mū'minūn 5-6) (Mardani, 2019). They also have been warned by the Quran (QS al-Ankabūt 31-32) to deny any kind of sexual disorientation that can destroy humanity (*fāḥishah*) (QS al-Shu'ārā 165-166) (Saleh & Arif, 2018).

### **Islamic Human Rights**

It is true that an individual's human rights must be protected, primarily for any fundamental rights that cannot be derogated, such as the rights of life, freedom of religion, and others. However, some rights that tend to oppose religious values, public virtues, and morality must be limited as the law legally has stated. In spite of the fact that this limitation has invited complexities of endless debates between universalism and particularism of human rights, the Islamic perspective has not ignored the essence of the "universality" of human rights (Hamdani, 2016). Consequently, while Western human rights have been upheld based on anthropocentric foundations and theocentric arguments have inspired the Islamic one, the point of universality might be the bridge that opens

the constructive dialogue between two schools of thought. In terms of facing the challenging discourse of the rights of LGBTQ, the limitation means not only the affirmation of Islamic legal prohibition but also the substantive virtues within the universality of human rights.

Human rights limitations in this context do not merely aim to fulfill the sense of individualism (Washil & Fata, 2018) because every individual must also respect collectivism and tradition (Hamdani, 2016). Based on this argument, as Tahir Mahmud states, Islamic human rights respect the principles of equality before the law, freedom of religion or belief, rights of individual well-being, welfare, and prosperity, and also rights to having family, and property and human dignity (Hamdani, 2016).

### **Islamic Private Rights**

ICCPR has protected the political and civil rights of every individual, including the private rights of having a family. Article 17 of the instrument states that any individual cannot interfere with the private matters of others, such as family, house, and dignity. Article 16 states that any individual has a right to marriage based on his or her personal choice and consideration (Baderin, 2003). The ICCPR statements are relevant to what are accommodated within the Islamic human rights document (Cairo Declaration) (Baderin, 2003). However, the latter has strictly allowed only the man-woman relation to building the marital bond. It means, consequently, the relation that is not based on the man-woman relation has been argued to be a part of deviation within a societal moral standard. Therefore, it is against Islamic private rights.

### **Islamic Human Rights and Responsibility for a Couple**

The Islamic legal understanding explains the responsibility and rights of man-woman in a marital relation. Both are closely related to bride price (*mahr*) and basic necessities of life given to the wife (*nafaqah*). The former is the amount of money or other valuable goods (such as gold) due to the formal agreement in Islamic marriage, while the latter means the responsibility of a husband to serve his wife regarding their necessities of life such as health, house, clothes, and others. Both have

been supported by a fundamental theological reference, especially the Quran surah al-Baqarah verse 233 (Mohamad, 2015). In addition, both husband and wife must do good deeds and behavior in order to guarantee their marital bond, such as respecting and protecting each other. In Islamic tradition, a husband has special responsibility to lead and guide his wife (Mohamad, 2015). Based on the KHI and Law No. 1/1974, these essential matters in a family are strongly appreciated (Samsidar, 2017). Thus, in this context, rights and responsibility are two faces of one coin.

To achieve the marriage objective (that is happiness), a couple needs to build harmonic cooperation based on humanistic awareness and love. To uphold cooperation, mutual understanding is important. It is highly likely the main requirement to ensure that their marriage within a journey of life can be enjoyed each other without any misunderstanding, tension, and event conflict (Bahri, 2015). One of the important rights and responsibilities within a marriage is to give a *nafaqah*. However, it must be fulfilled not only in terms of material needs but also in terms of inner and spiritual needs. The latter also covers the importance of sexual activity as a couple to guarantee their harmonic happiness. It is also their possible way of getting babies and maintaining their offspring. The objective, rights, and responsibilities are relevant to Article 33 of Law No. 1/1974 (Samsidar, 2017).

### **The Fact of LGBTQ and Human Rights in the Muslim World**

Although the sharia law strongly forbids the LGBTQ acts and orientations, the Qur'an does not exclusively stipulate any punishment regarding the acts and orientations. Some Prophetic traditions that had been significantly constructed by Arabic culture and tradition do it lethally. Based on both primary sources of sharia law, one can argue that the Qur'an has to be specialized by the traditions. At the same time, other may suggest that the sources are open to be critically interpreted (*ijtihad*) due to the current development of human rights context.

Eleni Polymenopoulou interestingly finds the fact of religious law polemics between "Gay-Friendly Mosques vs. Islamization" (Polymenopoulou, 2020). She depicts that "Inclusive and gay-friendly mosques are mushrooming, and some *imāms* have come out as gay or otherwise celebrate same-sex unions in countries such as France, Canada,

South Africa, Australia, and the United States" (Polymenopoulou, 2020). However, she obviously shows that "LGBTQ individuals in Muslim countries are still at risk, as they are in danger of being stripped of their most fundamental rights" (Polymenopoulou, 2020). This latter evidence is based on her study on some Muslim countries such as Iran ("gay people are being hanged"), Saudi Arabia ("in beheaded and tortured"), and Brunei ("passed a law naming stoning as the appropriate punishment for homosexuality"). What has happened in Indonesia – the largest Muslim majority country which ratified almost all international human rights instruments – mentions nothing regarding the legal instruments for LGBTQ. It has remained in ambiguous and unclear regardless the constitution has protected their rights of life.

## **Conclusion**

The fields of study that supports of this legal investigation are general legal study, Islamic law, human rights and the law and administration in Indonesia. This article has an orientation to answer both these questions: can the bisexual orientation in a marriage bond be put to be a legal argument for formulating a verdict in the court? Does it have such a specific legal standing in which mentioned directly within any regulation covering the issue of the Islamic private law? In answering these both questions, this article implements a normative-juridical inquiry – that elaboratively combines several disciplines in the legal study – that examines various rational possibilities in the development of arguments of law.

In the process of producing the verdict of law in the case of divorce, implementing Article 1 of Law No. 1/1974 finds it difficult. According to Article 39 (2) (the legal explanation of the law, point a) of Law No. 1/1974 and Article 19 (a) of Regulation No. 9/1975 jo the Article 116 (a) of the KHI, the divorce is being possible due to the rationale of adultery of one of those who are engaged legally by marriage (wife or husband). According to Article 284 of the Indonesian Criminal Law (KUHP), adultery is sexual intercourse between a married man or woman, and while according to Islamic law, it happens due to the sexual activity between a man and woman, although they have not been married yet. Based on this argument, bisexual orientation within a marital bond seems to be difficult to avoid deviant behavior. It potentially leads to

conflicts that destroy a marriage. The crucial part of the unresolved conflict is mentioned in Article 39 (2) of the law, Article 19 (f) of the Regulation and the Article 116 (f) of KHI. However, the argument has no clearer legal explanation emphasizing that bisexual orientation might be directly considered to be an argument for divorce. This situation leads to the legal vacuum (*recht vacuum*).

This article arguably states that bisexual orientation might not be a legal standing of constituting a verdict. The reason is that it is not directly mentioned within any legal instrument has been imposed regarding the case of Islamic private law, especially marriage and divorce. As a consequence, in order to solve the problem, the judge tends to implement Article 39 (2) (the legal explanation of the law, point a) of Law No. 1/1974 and Article 19 (a) of Regulation No. 9/1975 jo. Article 116 (a) of the KHI that mention adultery as a legal rationale of divorce in the court, since the orientation within a bond of marriage tends to commit in adultery and it leads the destructive circumstances for the bond itself (the implementation of Article 39 (2) (the legal explanation of the law, point f) of the Law, Article 19 (f) of Regulation and Article 116 (f) of the KHI).

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