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Comparative Study of the Criminal Regulation of Homosexual Acts in Indonesian and Malaysian Law

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ABSTRACT

Homosexuality is often debated in the world community. Many countries are against homosexuals. However, some are also in favor of these social deviations. Indonesian society considers homosexuality deviant and violates religious rules. Likewise in Malaysia, which has a background of not legalizing same-sex marriage and instead criminalizing it. This research aims to compare the legal regulation of homosexuality in the perspective of Indonesian criminal law and Malaysian criminal law. As well as to find out matters related to the regulation of homosexual criminal law in Indonesia and Malaysia. The method used in this research is normative research, namely by using various secondary data including laws, court decisions and legal theories. This research found various differences and similarities in regulating homosexuals from the perspective of the legal regulations of the two countries. Indonesia has legal rules for homosexual offenders who intentionally commit same-sex sexual abuse by minors in Article 292 of the Criminal Code. In particular, homosexual acts have no binding legal rules and are still a legal vacuum. Whereas Malaysia considers homosexuality a sexual deviation that needs to be strictly punished according to the state 377AB Kanun Keseksaan or Malaysia Code Penal and Sharia law. In terms of legal sanctions, Indonesia has similarities, namely imprisonment, fines, and whipping. Whipping for all Muslims in Malaysia who commit homosexual crimes. Meanwhile, flogging in Indonesia is specifically stipulated in the Aceh region which violates the rules, one of which is homosexuality or liwath.

Keywords: *Comparative Law, Homosexuality, Sharia Law*

INTRODUCTION

Sexuality refers to the expression of human sexual desire, which encompasses libido and erotic attraction. It is a multifaceted phenomenon shaped by various biological, psychological, social, economic, political, religious, and spiritual factors. Human sex classification is intrinsically linked to gender identity, sexual orientation, and sexual behavior. Biologically, sex is generally categorized into two classifications: male and female.¹

Sexual orientation, in legal and psychological contexts, may be defined as an enduring pattern of emotional, romantic, or sexual attraction to individuals of the opposite sex, the same sex, or both. It pertains to the gender toward which an individual experiences sexual or emotional attraction.² Commonly, sexual orientation is classified into five categories:

1. Bisexuality
2. Homosexuality
3. Heterosexuality
4. Pansexuality
5. Asexuality

As noted by Supratiknya in *Mengenal Perilaku Abnormal* (1995),³ certain forms of sexual orientation, particularly homosexuality, have historically been associated with abnormal behavior in psychological literature. Supratiknya outlines several contributing factors that may influence the development of non-heteronormative sexual orientations, though contemporary understandings increasingly recognize the importance of respecting sexual diversity within both legal and human rights frameworks:

1. A deficiency in male hormones during critical stages of physical development;
2. Exposure to homosexual experiences during adolescence or adulthood;
3. A perception that heterosexual relationships are threatening or emotionally distressing; and
4. The presence of a dominant maternal figure in the absence or diminished role of a paternal figure within the family structure.

Within the context of Indonesian culture, discussions surrounding sexuality, including homosexuality, are often influenced by a prevailing sense of modesty and social restraint. Cultural norms generally discourage open dialogue about sexual

¹Siti Musdah Mulia, *Islam Dan Hak Asasi Manusia Konsep Dan Implementasi* | Perpustakaan Komnas Perempuan (Yogyakarta: Naufan Pustaka, 2010).

² Gail Wiscarz Stuart, *Principles and Practice of Psychiatric Nursing* (Elsevier Mosby, 2012).

³ A Suprariknya, *Mengenal Perilaku Abnormal* (Yogyakarta: Kanisius, 1995).

orientation, rendering topics such as homosexuality private and socially sensitive.⁴ While societal tolerance toward homosexual individuals may exist in practice, public discourse on the matter remains limited due to deep-rooted cultural taboos.

Historically, Indonesian media have occasionally portrayed transgender or effeminate male characters (often referred to as *waria*) in entertainment settings. These portrayals, while sometimes intended to elicit humor, reflect a paradoxical societal stance: one that publicly engages with gender nonconformity for comedic purposes while simultaneously avoiding substantive discussion of the underlying issues of sexual orientation and identity. Prior to the emergence of platforms advocating LGBTQ+ rights and visibility, Indonesian society largely considered such matters inappropriate for public discourse.⁵⁶

Homosexuality has long been a subject of global societal debate. While many countries express opposition to such practices, others have adopted more supportive stances toward what is often categorized as a social deviation. Proponents of homosexuality argue that both the state and society are obliged to uphold the principle of non-discrimination, regardless of whether individuals identify as male, female, transgender, heterosexual, or homosexual. Support for homosexual rights is frequently grounded in human rights discourse, with advocates asserting that sexual orientation constitutes an essential aspect of fundamental human rights.⁷ Law No. 39 of 1999 on Human Rights affirms that human rights are inherent to every human being as a creation of the Almighty God and as a divine endowment that must be respected, upheld, and protected by the state.

Nevertheless, human rights are not absolute; they must not contravene religious values, morality, public security, or public order. Although Indonesia is not a theocratic state, the foundational philosophy of Pancasila explicitly affirms in its first principle the belief in the One and Only God. Consequently, religious values constitute an essential component of the constitutional framework that underpins the democratic order of the Indonesian nation.

The phenomenon of deviant sexual orientation has also become increasingly prevalent in Malaysia. The emergence of Lesbian, Gay, Bisexual, and Transgender (LGBT) groups in Malaysia can be traced back to the appearance of *pondan* and

⁴ Iraklis Grigoropoulos, "Sexual Orientation Attributions And Conventional Pre-Existing Values in the Context of Sexual Minorities' Rights," *Psychological Thought* 15, no. 2 (October 30, 2022): 218–232, <https://psyc.swu.bg/index.php/psyc/article/view/697>.

⁵ Amirah Fadhlina, "Waria , Worship, and Welfare: Exploring Trans Women's Conditions of Precarity Amidst COVID-19 in Yogyakarta, Indonesia," *TRANS: Trans -Regional and -National Studies of Southeast Asia* 12, no. 1 (May 19, 2024): 78–94, https://www.cambridge.org/core/product/identifier/S2051364X24000012/type/journal_article.

⁶ Ahnaf Fairuzuhdy Aslam, Erika Intan Hulieta, and Ammar Bianda Katon, "Gender Construction in Southeast Asia Through a Social Constructivism Perspective," *Insignia: Journal of International Relations* 9, no. 1 (April 30, 2022): 37, <http://jos.unsoed.ac.id/index.php/insignia/article/view/5128>.

⁷ Paul Chaney, Seuty Sabur, and Sarbeswar Sahoo, "Civil Society Organisations and LGBT+ Rights in Bangladesh: A Critical Analysis," *Journal of South Asian Development* 15, no. 2 (August 7, 2020): 184–208, <https://journals.sagepub.com/doi/10.1177/0973174120950512>.

mak nyah in the 1980s.⁸ The terms *pondan* and *mak nyah* are Malay expressions referring to male-to-female transgender individuals⁹. In Arabic, *mak nyah* is associated with the term *mukhannas*, which metaphorically means “like a broken bottle neck,” describing men who display effeminate and seductive characteristics akin to women.¹⁰

In Indonesia, there is no definitive data regarding the exact population of individuals with homosexual orientation. However, based on data from the Ministry of Health, men who have sex with men (MSM) are estimated to account for 27.2% of the population vulnerable to HIV transmission.¹¹ In contrast, data from the Department of Islamic Development Malaysia (JAKIM) indicate that the number of LGBT individuals continues to increase. It is estimated that Malaysia has approximately 310,000 homosexual individuals and around 30,000 transgender individuals.¹² Although these figures have not been officially verified, JAKIM has reported success in rehabilitating 1,450 individuals through its *Mukhayyam* program. Additionally, the Selangor Islamic Religious Council (*Majlis Agama Islam Selangor*, MAIS) has implemented recovery initiatives aimed at assisting LGBT individuals, including those with homosexual orientation, through religious outreach programs managed under the Rehabilitation Division (*Bahagian Pemulihan Al-Riqab*).

Indonesia lacks a clear and specific legal framework regulating homosexual conduct. The only explicit provision is found in Article 292 of the Indonesian Criminal Code (KUHP), which criminalizes acts of same-sex indecency involving minors.¹³ However, this provision does not extend legal protection to adult victims subjected to indecent acts by individuals of the same sex. Moreover, prosecution is only possible when non-consensual acts of indecency occur. In the absence of comprehensive legal regulation, homosexuality continues to exist unrestrained due to the lack of robust and targeted legal provisions addressing such conduct.

In contrast, Malaysia adopts a more assertive legal stance. Section 377A of the Malaysian Penal Code (Act 574) criminalizes carnal intercourse against the

⁸ Azman Ab Rahman et al., “Rehabilitation Program for Lesbian, Gay, Bisexual And Transgender (LGBT): Riqab’s Rehabilitation Section, Majlis Agama Islam Selangor (MAIS),” *Perdana: International Journal of Academic Research* 6, no. 2 (December 31, 2019): 26–34, accessed July 16, 2025, <https://perdanajournal.com/index.php/perdanajournal/article/view/55>.

⁹ Mohd Asri bin Zainul Abidin, “Hukum Berinteraksi Dengan Mukhannath (Pondan / Mak Nyah / Bapuk / Pengkid / Tomboi / Transgender),” accessed July 16, 2025, <https://muftiperlis.gov.my/index.php/en/himpunan-fatwa-negeri/575-hukum-berinteraksi-dengan-mukhannath-pondan-mak-nyah-bapuk-pengkid-tomboi-taransgender>.

¹⁰ *Manual Islam & Mak Nyah* (Selangor: Percetakan Tinta Sdn. Bhd, 2013).

¹¹ “Laporan Perkembangan HIV AIDS Dan Penyakit Infeksi Menular Seksual (PIMS),” *Kemendes Indonesia*, accessed July 17, 2025, https://siha.kemkes.go.id/portal/files_upload/Laporan_TW_I_2021_FINAL.pdf.

¹² Rahman et al., “Rehabilitation Program for Lesbian, Gay, Bisexual And Transgender (LGBT): Riqab’s Rehabilitation Section, Majlis Agama Islam Selangor (MAIS).”

¹³ *Kitab Undang-Undang Hukum Pidana* (Jakarta, 2021).

order of nature.¹⁴ This includes sexual acts involving the insertion of a male genital organ into the anus or mouth of another person. Such conduct, even when carried out consensually between adults, falls within the ambit of the offence under Section 377A. This provision reflects Malaysia's stronger reliance on Syariah-based legal principles, as the country's laws expressly and firmly prohibit acts of homosexuality, framing them as criminal offences with the objective of eradicating LGBT conduct. Despite these differences, both Indonesia and Malaysia maintain similar legal positions regarding same-sex marriage, with both jurisdictions explicitly prohibiting such unions under their respective marriage laws.

It can thus be concluded that both Indonesia and Malaysia prohibit same-sex marriage under their respective legal systems. Nevertheless, a significant legal gap remains in Indonesia with respect to consensual homosexual conduct between adults, as current statutory regulations do not provide clear or comprehensive legal provisions governing such matters.

LITERATURE REVIEW

Theory of Legal Comparison

This study adopts the theoretical framework of *comparative law*, which, by definition, is not a branch of law such as civil law, criminal law, or constitutional law. Rather, comparative law constitutes a methodological approach aimed at identifying and analyzing differences and similarities between legal systems.¹⁵ It involves the examination of how legal norms function in practice, including the juridical mechanisms employed to resolve legal issues, as well as the influence of non-legal factors on legal development and implementation. As noted by Van Apeldoorn (1954: 330), a scientific approach to comparative law requires an understanding of the historical evolution of the legal systems under comparison.¹⁶

Sentencing Theory

Sentencing can be understood as the imposition of punishment—a stage in the criminal justice process involving the application of legal sanctions.¹⁷ Article 51 of Law No. 1 of 2023 (Indonesia's new Criminal Code) stipulates that the primary objectives of sentencing are: to prevent the commission of criminal acts through the enforcement of legal norms for the protection and welfare of society (*prevention*); to reintegrate convicted persons through rehabilitation and guidance, enabling them to become responsible and constructive members of society

¹⁴ *Kanun Keseksaan 574 Atau Malaysia Penal Code* (Malaysia, n.d.), accessed July 17, 2025, <https://www.sprm.gov.my/admin/files/sprm/assets/pdf/penguatkuasaan/kanun-keseksaan-bm.pdf>.

¹⁵ Soerjono Soekanto, *Perbandingan Hukum* (Bandung: Alumni, 1979).

¹⁶ DJAJA S.MELIALA, *Hukum Di Amerika Serikat : Suatu Studi Perbandingan Ringkas* (Bandung: TARSITO BANDUNG, 1977).

¹⁷ Caitlin P. Carroll, "Reinvestigating the Sexual Violence 'Justice Gap' in the Swedish Criminal Justice System: Victim-Centered Alternatives to the Criminal Trial," *Feminist Criminology* 18, no. 1 (January 24, 2023): 45–64, <https://journals.sagepub.com/doi/10.1177/15570851221077673>.

(*rehabilitation*); and to resolve the social conflict caused by the offense, restore the societal balance, ensure public peace and order, and cultivate remorse while alleviating the offender's sense of guilt (*restorative justice and reintegration*).¹⁸ Sentencing is not intended to degrade human dignity.

Contemporary theories concerning the purpose of sentencing generally fall into three main categories: the absolute theory, the relative (utilitarian) theory, and the combined theory. The absolute theory holds that punishment is a moral imperative—a form of retribution for the offense committed, independent of its utility or outcomes.¹⁹ In contrast, the relative theory, often referred to as the utilitarian theory, views punishment as a means to achieve broader social goals, such as deterring future crimes, protecting public order, and promoting societal welfare. Meanwhile, the combined theory seeks to reconcile these approaches by incorporating elements of both retributive justice and utilitarian purpose—acknowledging that while punishment may be a response to moral wrongdoing, it must also serve practical functions within the legal system.²⁰ Under the retributive perspective, criminal acts warrant penal sanctions regardless of whether such punishment has a deterrent effect on the offender or others.

RESEARCH METHODOLOGY

This study employs a normative legal research method, which is commonly applied in legal scholarship to examine legal norms, principles, and doctrines in response to specific legal issues.²¹ As defined by Peter Mahmud Marzuki, normative legal research focuses on discovering the law in the form of legislation, legal principles, and legal doctrines through conceptual and statutory analysis.

The analysis in this article is based on the doctrinal-normative approach, which draws upon secondary legal materials, including statutory regulations, court decisions, and scholarly legal commentary. The study primarily examines positive law, both written and unwritten, as it applies in Indonesia and Malaysia.

In addressing the comparative regulation of homosexual conduct under Indonesian and Malaysian criminal law, this approach utilizes a library-based methodology to explore and evaluate the legal norms underpinning both jurisdictions. Emphasis is placed on analyzing the relevant legal frameworks and

¹⁸ “Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Pidana,” n.d.

¹⁹ M Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana : Ide Dasar Double Track System & Implementasinya* / M. Sholehuddin | Perpustakaan Mahkamah Konstitusi (Jakarta: Radja Grafindo Persada, 2003).

²⁰ Syarif Saddam Rivanie et al., “Perkembangan Teori-Teori Tujuan Pemidanaan,” *Halu Oleo Law Review* 6, no. 2 (September 28, 2022): 176–188, accessed July 17, 2025, <https://holrev.uho.ac.id/index.php/journal/article/view/4>.

²¹ Irma Shintia Kumaralo, Risdalina Risdalina, and Indra Kumala Sari M, “The Legal Force of the Cooperation Agreement Letter in a Cooperation Agreement Is Reviewed According to Article 1320 of the Civil Code,” *Journal of Social Research* 2, no. 3 (February 27, 2023): 917–923, <https://ijsr.internationaljournallabs.com/index.php/ijsr/article/view/750>.

their doctrinal foundations to provide a structured and comparative legal assessment.

RESULT AND DISCUSSION

Legal Regulation of Homosexual Conduct from the Perspective of Indonesian Criminal Law

The phenomenon of homosexuality continues to provoke considerable public debate in Indonesia, generating both support and opposition. This divergence is primarily rooted in prevailing societal norms that traditionally recognize heterosexual orientation—sexual relationships between individuals of the opposite sex—as the normative standard. Consequently, individuals who identify as homosexual are frequently perceived as engaging in deviant behavior.²² Supporters of homosexuality often invoke human rights discourse to assert that sexual orientation constitutes an individual right, falling under the broader umbrella of personal freedoms and protections. Conversely, opponents argue that homosexuality is a form of social deviance incompatible with national values, religious teachings, and cultural morality. They further contend that the normalization of such behavior could potentially erode the moral fabric of society and adversely impact future generations.

The negative stigma attached to homosexuality within conservative communities has contributed to the social marginalization and exclusion of individuals who identify as LGBTQ+. Despite the fact that homosexuality is not explicitly criminalized under Indonesian law, members of the LGBTQ+ community frequently experience discrimination, social rejection, and acts of violence. These responses indicate a complex tension between the formal legality of same-sex orientation and the sociocultural resistance to its acceptance within the broader community.²³

Homosexuality is often regarded as a deviation from normative sexual orientation, characterized by emotional and sexual attraction toward individuals of the same sex. In the Indonesian legal system, regulatory provisions concerning homosexual behavior remain inadequate and fragmented. While same-sex marriage is explicitly prohibited, comprehensive legal norms addressing consensual same-sex relations, particularly between adults, are absent.

The prohibition of same-sex marriage is clearly articulated in Article 1 of Law No. 1 of 1974 on Marriage, which defines marriage as “a physical and spiritual bond between a man and a woman as husband and wife, with the aim of establishing a happy and eternal family (household) founded on the belief in the One and Only

²² Novia Indah Lestari, “Manajemen Impresi Lesbian (Studi Pada Empat Lesbian Di Pamulang Tangerang Selatan),” *Pendas, Dasar-dasar Teori Pembelajaran Pembelajaran* 1, no. 2 (2020): 3.

²³ Gerardo Bandera, “Which Countries Impose the Death Penalty on Gay People?,” *Our Brew*, last modified June 10, 2023, accessed July 17, 2025, <https://www.ourbrew.ph/which-countries-impose-the-death-penalty-on-gay-people/>.

God.”²⁴ This provision affirms that Indonesian marriage law exclusively recognizes unions between a man and a woman, thereby excluding the legal recognition of same-sex partnerships.

Criminal regulation concerning same-sex conduct appears in Article 292 of the Indonesian Criminal Code (KUHP), which stipulates that “an adult who commits an act of indecency with another person of the same sex, knowing or reasonably suspected that the person is underage, shall be subject to a maximum imprisonment of five years.”²⁵

However, this provision solely addresses cases involving minors and fails to provide legal clarity for consensual same-sex conduct between adults. Moreover, other provisions within the KUHP that regulate offenses against morality (*delik kesusilaan*) do not contain explicit or comprehensive legal norms addressing indecent acts between same-sex adults.²⁶

According to legal scholar R. Soesilo, an individual is categorized as an adult either when they have reached the age of 21 or, if under that age, have entered into a lawful marriage. Meanwhile, Article 330 of the Indonesian Civil Code (KUHP Perdata) defines “minors as individuals who have not yet reached the age of twenty-one and have never been married. It further clarifies that even if a marriage is dissolved before the age of twenty-one, such individuals do not revert to minor status. Those categorized as minors and who are not under parental authority fall under legal guardianship in accordance with the procedures outlined in Sections 3 to 6 of the relevant chapter.”²⁷ Consequently, individuals above the age threshold fall within the scope of both potential offenders and victims under Article 292 of the Indonesian Criminal Code, which addresses same-sex acts involving minors. However, this article does not extend criminal liability to consensual same-sex acts between adults.

Indonesian pornography law also lacks explicit provisions targeting homosexual acts. The relevant sanctions are limited to individuals who disseminate, document, or distribute pornographic content. Article 4 of the Pornography Law stipulates that such acts are subject to a maximum sentence of 12 years’ imprisonment and/or a fine of up to six billion Indonesian rupiah.

At the regional level, the Province of Aceh enforces Islamic criminal law (*jinayat*) through Qanun Aceh No. 6 of 2014. Within this regulation, homosexual acts are referred to as *liwath*, defined as an act in which a man intentionally inserts

²⁴ “UU No. 1 Tahun 1974 Tentang Perkawinan,” 1974, accessed July 17, 2025, <https://peraturan.bpk.go.id/Details/47406/uu-no-1-tahun-1974>.

²⁵ *Kitab Undang-Undang Hukum Pidana*.

²⁶ Riswan Erfa, “Kriminalisasi Perbuatan Cabul Yang Dilakukan Oleh Pasangan Sesama Jenis Kelamin (Homoseksual),” *Arena Hukum* 8, no. 2 (August 1, 2015): 236–257, accessed July 17, 2025, <https://jurnal.hukumonline.com/a/5cb48f1201fb730011dd27b7/kriminalisasi-perbuatan-cabul-yang-dilakukan-oleh-pasangan-sesama-jenis-kelamin-homoseksual/>.

²⁷ *Kitab Undang-Undang Hukum Perdata*, n.d.

his penis into another man's anus with mutual consent.²⁸ Article 63 prescribes that "any individual committing liwath is subject to uqubat ta'zir, which may include up to 100 lashes, a fine equivalent to 1,000 grams of pure gold, or imprisonment for up to 100 months."²⁹ Nevertheless, the application of this qanun is territorially restricted to the Aceh region and does not have national applicability within Indonesia.

Legal Regulation of Homosexual Acts under Malaysian Criminal Law

Malaysia is recognized as one of the most homophobic countries in the world. Public attitudes toward the LGBT community are predominantly shaped by Islamic teachings, which serve as the foundation of the country's legal and moral framework. Although Islam is the largest religion in Malaysia, other religious groups—such as Christians—also demonstrate conservative views on homosexuality. Consequently, LGBT individuals in Malaysia often report heightened experiences of discrimination and social hostility.³⁰

Among Asian countries surveyed, Malaysia consistently ranks among the lowest in terms of societal acceptance of homosexuality. In 2013, only 9% of Malaysians expressed acceptance of homosexuality.³¹ In line with this stance, the Malaysian National Blood Centre prohibits homosexual individuals from donating blood.³²

Malaysia, like Indonesia, has a Muslim-majority population, with over 60% of its approximately 32 million residents adhering to Islam.³³ The Malaysian legal system operates under a dual structure comprising civil law, Shariah law, federal law, and state legislation. Shariah law, applicable only to Muslims, holds subordinate authority to civil law, which is enforced universally across religious lines.³⁴

²⁸ Beby Suryani Fithri and Kartika Arie, "Urgensi Pengaturan Hukum Perbuatan Homoseksual Di Dalam Peraturan Perundang-Undangan Pidana Di Indonesia" (2018), accessed July 17, 2025, <https://repository.uma.ac.id/handle/123456789/8825>.

²⁹ "Qanun Aceh Nomor 6 Tahun 2014 Tentang Hukum Jinayat," n.d.

³⁰ "Malaysia: State-Backed Discrimination Harms LGBT People | Human Rights Watch," *Human Rights Watch*, last modified August 10, 2022, accessed July 17, 2025, <https://www.hrw.org/news/2022/08/10/malaysia-state-backed-discrimination-harms-lgbt-people>.

³¹ Andrew Kohut et al., "The Global Divide on Homosexuality Greater Acceptance in More Secular and Affluent Countries," *PewResearchCenter* (2013), accessed July 17, 2025, <http://pewglobal.org>.

³² "Kriteria Penderma Darah," accessed July 17, 2025, <https://jknselangor.moh.gov.my/hbanting/index.php/ms/orang-awam/kempen-derma-darah/kriteria-penderma-darah>.

³³ "Ingin Tindak Pro LGBT, Malaysia Perkuat Hukum Syariah," *DW*, last modified June 25, 2021, accessed July 17, 2025, <https://www.dw.com/id/tindak-komunitas-pro-lgbt-malaysia-perkuat-hukum-syariah/a-58039749>.

³⁴ Aminuddin Aminuddin, "Undang-Undang Syari'ah Dan Undang-Undang Sipil Di Malaysia Suatu Perbandingan" (UIN Syarif Hidayatullah Jakarta, 2008), accessed July 17, 2025, https://repository.uinjkt.ac.id/dspace/bitstream/123456789/19706/1/AMINUDDIN_RAMLI-FSH.pdf.

Unlike the Indonesian legal framework, which lacks explicit provisions criminalizing consensual homosexual conduct unless accompanied by other criminal offenses, Malaysian criminal law explicitly penalizes homosexual acts, including consensual sodomy. This is governed under Section 377A of the Malaysian Penal Code (Kanun Keseksaan 574), which states: “Any person who has sexual intercourse with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.” Furthermore, Section 377B stipulates the associated penal sanctions: “Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.”³⁵ Thus, even consensual same-sex sexual relations are criminalized in Malaysia under the notion of being “against the order of nature” (*bertentangan dengan aturan tabii*), with offenders subject to severe penalties including long-term imprisonment and corporal punishment. This reflects a significant divergence from the Indonesian approach, where no equivalent provision exists within the national criminal code unless such acts involve minors or are deemed obscene under broader decency laws.

In Malaysia, the criminalization of homosexuality is governed under the Malaysian Penal Code (Kanun Keseksaan 574), which constitutes part of the country’s civil legal framework, rather than Islamic (Shariah) law. The Penal Code regulates general criminal matters, including defamation, adultery, murder, and other criminal offenses. By contrast, Shariah law in Malaysia primarily governs matters of religious observance and personal status, such as marriage, inheritance, and family law.³⁶

Under the Penal Code, criminal sanctions such as imprisonment and fines are applicable to individuals found guilty of committing homosexual acts. However, corporal punishment—specifically caning—is imposed under the Shariah legal system and is applicable exclusively to Muslim offenders. While civil law applies broadly and is enforced across both Muslim and non-Muslim populations in Malaysia, its implementation may differ depending on the religious status of the individual. Non-Muslims who are found guilty of engaging in homosexual conduct are still subject to penalties under Section 377B of the Penal Code, which may include imprisonment and fines. However, they are not subjected to corporal punishment such as caning, which remains a penalty reserved for Muslim offenders under Shariah jurisdiction.³⁷

³⁵ Kanun Keseksaan 574 Atau Malaysia Penal Code.

³⁶ Aminuddin, “Undang-Undang Syari’ah Dan Undang-Undang Sipil Di Malaysia Suatu Perbandingan.”

³⁷ HZ, “Warga Malaysia Apresiasi Wali Kota Dalam Penegakan Syari’at Islam - Diskominfo Banda Aceh,” *Diskominforitik Pemerintahan Kota Banda Aceh*, last modified March 1, 2018, accessed July 17, 2025, <https://diskominfo.bandaacehkota.go.id/2018/03/01/warga-malaysia-apresiasi-wali-kota-dalam-penegakan-syariat-islam/>.

Legal Distinctions in the Regulation of Homosexuality in Indonesia and Malaysia

A fundamental distinction between Indonesia and Malaysia lies in the legal recognition and regulation of homosexuality. In Indonesia, homosexuality is not explicitly regulated within the national criminal law framework. There is no specific statutory provision that directly criminalizes consensual same-sex relationships between adults. The existing legal instruments only address homosexual acts when they involve violations of morality or acts of indecency, particularly when committed against minors. For example, Article 292 of the Indonesian Penal Code (KUHP) criminalizes acts of indecency committed by an adult against a minor of the same sex, prescribing a maximum imprisonment of five years. However, this provision does not extend to consensual same-sex conduct between adults, nor does it provide a comprehensive regulatory framework on homosexuality.

Furthermore, Law No. 44 of 2008 on Pornography, particularly Article 4, prohibits the production, distribution, and commercialization of pornographic materials that depict deviant sexual acts. These include sexual activities involving corpses, animals, oral sex, anal sex, lesbianism, and homosexuality.³⁸ Although homosexuality itself is not criminalized under Indonesia's national criminal law, this provision indirectly reflects the state's stance toward non-normative sexual behavior by categorizing such acts as forms of deviant pornography.

In contrast, Malaysia explicitly criminalizes homosexual conduct. Although the term "homosexual" is not expressly mentioned, Section 377A of the Malaysian Penal Code (Kanun Keseksaan 574) targets acts of sodomy, defined as oral or anal sex, regardless of mutual consent, including between individuals of the same sex. Such conduct is punishable by up to twenty years of imprisonment, and for Muslim individuals, additional penalties such as whipping may be imposed under Sharia law. Consequently, homosexual orientation and conduct are clearly regulated under both Malaysia's federal criminal law and Syariah law, offering a more comprehensive and punitive legal framework than that found in Indonesia.

A key distinction in Malaysia's legal framework lies in the application of corporal punishment, specifically caning, which is enforceable only upon Muslim offenders under Sharia law. Non-Muslim individuals found guilty of similar offenses are subject to civil law penalties, such as imprisonment and fines, without corporal punishment. In contrast, Indonesia also enforces caning, but this is limited to the province of Aceh, where Qanun laws—regional regulations governing the administration and Islamic life of Acehnese society—specifically address homosexual acts.

³⁸ *Undang-Undang Republik Indonesia Nomor 44 Tahun 2008 Tentang Pornografi*, 2008.

Thus, the legal treatment of homosexual conduct in Indonesia and Malaysia reveals a significant divergence. These differences are evident in the types of penalties imposed, the legal instruments employed, the statutory elements of the offenses, the judicial interpretations, and the breadth of regulatory coverage. Malaysia provides a more explicit and unified legal prohibition on homosexual conduct, while Indonesia's approach remains fragmented and regionally limited, with national criminal law offering only indirect provisions and selective enforcement.

Similarities Between Indonesia and Malaysia in Regulating Homosexual Contact

The regulatory convergence between Indonesia and Malaysia concerning homosexual conduct is primarily observable in the application of Sharia law. Both jurisdictions, due to their majority-Muslim populations, have integrated religious norms into their respective legal systems. In Malaysia, Sharia law is implemented across several states, whereas in Indonesia it is specifically enforced in the Province of Aceh. These religious-based regulations operate under the broader framework of federal or national laws, and their formulation must remain consistent with overarching statutory instruments.

Another point of similarity lies in the penal sanctions imposed by both countries. Under Malaysia's Penal Code (Kanun Keseksaan), individuals engaged in homosexual acts may face imprisonment, fines, and corporal punishment (caning). Likewise, in Indonesia, homosexual conduct involving minors is criminalized under Article 292 of the Indonesian Criminal Code (KUHP), which prescribes imprisonment and fines. The application of caning, however, is limited to Aceh, pursuant to Article 63 of Qanun Aceh No. 6 of 2014 on Jinayat Law, and is specifically applicable to Muslim offenders. This mirrors the practice in Malaysia, where caning is reserved for Muslim offenders under Sharia provisions, while imprisonment and fines apply universally, regardless of religious affiliation.

Both Indonesia and Malaysia prohibit same-sex marriage, a position that reflects the broader legal and cultural discourse in Muslim-majority countries regarding the recognition of homosexual relationships. In Indonesia, Article 1 of Law No. 1 of 1974 on Marriage explicitly states that: "Marriage is a physical and spiritual bond between a man and a woman as husband and wife, with the objective of establishing a happy and eternal family (household) founded on the belief in the One and Only God."³⁹ Similarly, in Malaysia, while there is no express statutory definition of marriage as a union between a man and a woman under civil law, the Islamic Family Law Act 1984 provides marriage requirements that implicitly

³⁹ "UU No. 1 Tahun 1974 Tentang Perkawinan."

recognize only heterosexual unions, as indicated by the language referring solely to “male” and “female” parties.⁴⁰

Both legal frameworks also contain provisions prohibiting deviant sexual acts, particularly acts involving the insertion of the male sexual organ into another person’s anus or mouth, which are classified as offences against morality. In this respect, both jurisdictions share a normative foundation shaped by religious and cultural values. However, a key distinction lies in the criminalization of homosexuality. In Indonesia, consensual homosexual acts between adults are not criminalized, unless involving minors or violating public decency laws. In contrast, Malaysia explicitly criminalizes homosexual conduct under Section 377A of the Penal Code, imposing severe penalties regardless of consent.

Another legal parallel between the two countries is the existence of a dual legal system, comprising civil law applicable nationwide and Sharia law enforced at the regional or state level. In Indonesia, Sharia law is uniquely applied in Aceh Province, while in Malaysia, Sharia law is applicable to Muslims across various states. Beyond legal provisions, mass media and digital platforms have amplified the visibility of LGBT individuals, including homosexuals, in both countries. Social media, in particular, has become a space for self-expression, allowing individuals to showcase their identities with relative freedom. This media exposure has, to some extent, emboldened members of the LGBT community to express their orientation more openly, even in societies where such expressions remain socially and legally contentious.

Thus, the comparative analysis of homosexual regulation in Indonesia and Malaysia reveals several legal similarities, particularly in the implementation of Sharia law, the criminal sanctions imposed, the legal definition of marriage as a heterosexual union, and the influence of colonial legal heritage. Despite the fact that both countries have Muslim-majority populations, and public attitudes often reflect widespread homophobic sentiments, these socio-religious factors have not led Indonesia to explicitly criminalize consensual homosexual conduct. Legal sanctions in Indonesia are generally only applied when such conduct involves violations of decency or involves minors, aligning with the view that sexual orientation is an individual right rather than a punishable act in itself. This comparative legal study underscores the importance of understanding the underlying legal, cultural, and religious factors that shape national responses to homosexuality. The rationale for undertaking this comparative inquiry lies in the identification of specific legal elements that may inform future legal development and policy considerations in both Indonesia and Malaysia.

CONCLUSION

⁴⁰ *Islamic Family Law (Federal Territories) Act 1984* (Malaysia, 1984).

Based on the foregoing discussion, it may be concluded that the legal regulation of homosexuality in Indonesia and Malaysia exhibits significant differences that lend themselves to comparative legal analysis. Although both countries share a predominantly Muslim population and do not recognize same-sex marriage, their respective legal frameworks reflect both divergences and commonalities.

In Indonesia, there is no explicit criminalization of homosexual conduct per se unless it is accompanied by acts that contravene public morality, such as in the case of Article 292 of the Indonesian Criminal Code, which penalizes same-sex acts involving minors with a maximum imprisonment of five years. In contrast, Malaysian federal law, under Section 377A of the Penal Code, categorizes homosexual acts as criminal offenses, defining them as “carnal intercourse against the order of nature”—specifically, sexual acts involving the insertion of the penis into the anus or mouth—and punishes such conduct with up to twenty years of imprisonment, fines, and corporal punishment (caning) for Muslim offenders.

Both jurisdictions recognize the application of Sharia law, though its enforcement varies. Malaysia enforces Sharia criminal sanctions for Muslims across several states, whereas in Indonesia, such jurisdiction is limited to the province of Aceh under the Qanun Aceh. In both systems, homosexual conduct is prohibited and may be subject to caning, though its scope and implementation differ in accordance with each country's legal and political structure.

The comparison between Indonesia and Malaysia demonstrates a significant divergence in the legal treatment of homosexual conduct, despite both being Muslim-majority countries that prohibit same-sex marriage.⁴¹ In Indonesia, homosexuality is not explicitly criminalized under national law unless it involves acts deemed immoral, such as same-sex conduct with minors as stipulated in Article 292 of the Indonesian Criminal Code. This creates a legal vacuum for consensual adult same-sex relationships, leaving such matters regulated indirectly through regional laws, such as the Qanun Jinayat in Aceh, which prescribes corporal punishment for homosexual acts based on Sharia principles. In contrast, Malaysia adopts a more codified and centralized approach, where Section 377A of the Malaysian Penal Code criminalizes same-sex acts outright as “intercourse against the order of nature,” punishable by imprisonment, fines, and, for Muslims, corporal punishment under Sharia law. While both countries incorporate religious and moral considerations into their legal systems, Malaysia enforces criminal sanctions more uniformly at the national level, whereas Indonesia relies on a fragmented framework influenced by regional autonomy and moral norms. This contrast

⁴¹ Evy Yuniastuti et al., “Prevalence and Associated Factors of Depressive Symptoms among People Living with HIV on Antiretroviral Therapy in Jakarta, Indonesia,” *Tropical Medicine & International Health* 26, no. 8 (August 16, 2021): 908–915, <https://onlinelibrary.wiley.com/doi/10.1111/tmi.13597>.

illustrates how both legal systems navigate the tension between religious morality, national legislation, and evolving human rights discourses.

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