



THE INDONESIAN CRIMINAL CODE: UNREGULATED ADULTERY (AN OVERVIEW OF ISLAMIC CRIMINAL LAW)

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Abstract

God created sexual intimacy to be enjoyed only in marriage. God has determined that Adam's children tend to commit adultery. This desire is inevitable, namely to commit adultery in the form of vision, adultery of the mouth in the form of narrative, adultery feelings through ideals and the desire to get it. However, it is the genitals who determine in adultery or not. The Indonesian Criminal Code does not view all non-marital sex relations as adultery. According to the Indonesian Criminal Code, adultery can only occur if sexual relations outside of marriage are carried out by people who are married. In addition, adultery in Indonesia cannot be threatened with punishment if there are no complaints from the victim who feel insulted or harmed, namely the husband or wife of the perpetrator.

Keywords: *Marriage, Adultery, Revenge*

1. INTRODUCTION

God created sexual intimacy to be enjoyed only in marriage (Uwadiae, 2012). Marriage is fundamentally built on trust, while adultery is fundamentally built on lies (Bateman, 2014). Adultery is the same as unfaithfulness (Akers, 2014). When people enter marriage, they usually do so with a formal promise to 'forsake all others' (Burrell, 2013). It is a sin when people who are married involved sexually with other people (Dieuvil, 2014). However, not all instances of sexual relations outside of marriage are adultery. A married woman who has been violently raped is not an adulteress—only wrongful intercourse outside of marriage is adultery (Machuga, 2015).

When a woman [sexually] approaches another woman, both of them are adulterers (*zāniyatān*) (Kamali, 2019). Who, after divorce, marry again are to be considered adulterers (Gallagher, 2019). Adultery is like murder, a term only used when we think the whole action is wrong (Dancy & Sandis, 2015). The dangers posed by adultery are very clear. It takes one person in the circle to get infected and all other persons will be at risk (Antom & Umar, 2019). The punishment for adultery is inherent in the crime. It comes naturally, without any direct intervention by God or a court (Berlin & Brettler, 2014).

Adultery is described as sexual intercourse between a married woman and any man not her husband (Abasili, 2016). Many scholars believe that female adulterers were punished more often than male adulterers; however, the examination of court records and letters from the Middle Ages reveal that despite the historical prevalence of misogyny and the church's ideology of equal condemnation of male and female adulterers, in reality, male adulterers were punished more frequently than women (Lely, 2019). Sexual freedom trumps sexual responsibility in today's arena of gender (Chung & Liu, 2018).

Adultery is about sex (Weil, 2003). Notice that in Middle Eastern culture, adultery is not about sex or sexual infidelity. It is about shame (Pilch, 2012). In England over the course

of the eighteenth and nineteenth centuries, the understanding of adultery as a tort was complicated by an discourse “quasi-criminality” (Sheley, 2018). The term adultery for many people carries a moral or religious association, while the term 'extramarital sex' is morally or judgmentally neutral. The interaction between laws on adultery with those on rape has and does pose particular problems in societies that are especially sensitive to sexual relations by a married woman, such as some Islamic (Muslim) countries. The difference between these offenses is that adultery is voluntary, while rape is not (Wilson, 2014).

The term adultery has a Judeo-Christian origin, although the concept of marital fidelity predates Judaism and is found in many other societies. Although the definition and consequences vary between religions, cultures, and legal jurisdictions, the concept is similar in Judaism, Christianity, and Islam (Wilson, 2014) Adultery in the perspective of Indonesian society is an act that is highly criticized and disputed, this is due to the culture and beliefs of the people who are devout, especially for Muslims. Nevertheless, article 284 paragraph (1) of the Indonesian Penal Code does not view all sexual relations outside marriage as adultery. According to the regulation, adultery can only occur if the sexual relations outside of marriage are carried out by people who are already married, and cannot be threatened with punishment if there are no complaints from the injured victim - husband or wife from the perpetrator.

Adultery in the perspective of Indonesian society is an act that is highly criticized and disputed, this is due to the culture and beliefs of the people who are devout, especially for Muslims. Islamic law and Indonesian criminal law have different views regarding adultery. Islamic law considers every sex relationship outside marriage is adultery and threatens it with severe punishment, whether the perpetrator is married or not, done like it or not. On the contrary, article 284 paragraph (1) of the Criminal Code Indonesia does not view all sex relations outside marriage as adultery. According to the Criminal Code, adultery can only occur if the sexual relations outside the marriage are carried out by people who are married, and cannot be threatened with punishment if there are no complaints from the victim who feel insulted or harmed by the husband or wife of the perpetrator.

In Indonesia, adultery is a crime stipulated in article 284 of the Criminal Code, the article applies if one of the adulterers has been bound to marriage, so for those who are not bound by marriage cannot be criminalized, in article 284 of the Criminal Code as a criminal offense with a prison sentence of up to nine months (Mahendra, 2019).

This article seeks to provide ideas in the form of revisions to unfavorable regulations by analyzing Indonesian criminal law regulations relating to criminal liability for adulterers. In the Indonesian Criminal Code Draft, criminal liability against adulterers was changed to imprisonment for five years in prison, the prison sentence no longer distinguishes between married and unmarried offenders.

2. IMPLEMENTATION METHOD

This research paper is a doctrinal research work with descriptive-cum-analytical in approach. It is largely based on secondary and electronic sources of data. Books, articles, research papers and other references are primarily helpful for the completion of this project.



3. RESULTS AND DISCUSSION

3.1 Criminal Provisions for Adultery in Indonesia

The term adultery has been characterized as consensual sex between a wedded individual and the person of opposite sex amid the subsistence of the marriage (Saksena, 2019). The concept “adultery” is conceptually connected with the concept “immorality” and to characterize a behavior as adulterous is already to characterize it as immoral (Imafidon & Bewaji, 2013). So that it is very appropriate to say adultery is one of the big sins (Smith, 2013).

Adultery is a crime that is so instant, so mysterious, and also hidden by fog that has been woven by the law itself, a veil that is really needed, but so obvious because it tends to add more than hiding the charm of its object. Opportunities are so frequent and hazards are known to be so easily avoided that it is easier for the law to prevent this crime than to punish it after it has been done (Wahmuji, 2011).

The judge's suspicion as evidence in the context of adultery has the power of free evidence, with other words being up to the judge's judgment, the strength of what evidence will be given to the judge's particular presumption. Will it be considered as evidence that has perfect strength, or as proof of the beginning or will not be given any strength whatsoever. This is because it is very difficult to find witnesses who see for themselves when the adultery took place. Therefore it has become a permanent Jurisprudence, that if two adult men and women who are not husband and wife sleep together (one of them has been married) in one room which only has one bed then for the act of adultery there is one judge's presumption (Sutantio & Oeripkartawinata, 1986).

Based on Indonesian positive criminal law, adultery is part of an offense which is an absolute complaint. Zina crime as an absolute criminal offense means that in all incidents of adultery a complaint requirement is needed for the prosecution of the maker or participant to be prosecuted. Bearing in mind that zina crime is a criminal act which requires two people to be realized, it is called an absolute inclusion, which cannot be separated from one another, even though the complainant complains about one person who committed adultery, does not cause prosecution against people who are not complained by the complainant. However, the public prosecutor, does not make the right not to prosecute people who do not complain based on the principle of opportunity (Chazawi, 2007).

There are two conflicting interests in the matter of criminal complaints, namely in one party the need for law is enforced, meaning that it is important for the state to be prosecuted, and on the other hand, for the victim there is an interest so that the criminal complaint is not prosecuted. In this case the interest of the victim not to be carried out by criminal prosecution takes precedence over the interests of the state in terms of enforcing the law. So that the role of the victim becomes very dominant (prioritized) in terms of the state to carry out criminal prosecution (Chazawi, 2011).

In order to be prosecuted for criminal offenses, a requirement for complaints from the rightful person is required. The requirement for a complaint for this criminal offense is what is meant by an element of additional requirements for being convicted (Chazawi, 2008a). Based on this, it needs to be thoroughly analyzed, namely whether adultery in Islamic

criminal law belongs to ordinary acts or criminal acts as stipulated in Indonesian Criminal Law?

The criminal provisions for adulterers in Indonesia are regulated in article 284 of the Criminal Code, the article reads as follows: 1. By a maximum imprisonment of nine months shall be punished: a. any married man who knowing that Article 27 of the Civil Code is applicable to him, commits adultery; b. any married woman who commits adultery; c. Any man who takes a direct part in the act knowing that the guilty co-partner is married; d. any unmarried woman who takes a direct part in the act knowing that the guilty co-partner is married and that Article 27 of the Civil Code is applicable to him. 2. No prosecution shall be instituted unless by complaint of the insulted spouse, followed, if to the spouse Article 27 of the Civil Code is applicable, within the time of three months by a demand for divorce or severance from board and bed on the ground of the same act. 3. In respect of this complaint Articles 72, 73 and 75 shall not be applicable. 4. The complaint may be withdrawn as long as the judicial investigation has not commenced. 5. If Article 27 of the Civil Code is applicable to the spouse, the complaint shall not be complied with as long as the marriage has not been severed by divorce or the verdict whereby severance from board and bed has been pronounced, has not become final.

According to the Indonesian Criminal Code, someone who has sex or sexual intercourse outside of marriage on the basis of liking in principle is not convicted, unless proven to have adultery (one of the parties is married). Those convicted according to the Criminal Code only if intercourse outside marriage is carried out by force (rape), against people who are unconscious, helpless or against children under the age of 15 years. Based on such provisions, according to the Criminal Code it is not a criminal offense in the following matters: 1. Two unmarried people who commit intercourse, even in the following cases: a). These deeds are seen as contradictory or disturbing the moral feelings of society; b). The woman wants to make love because of deception or promises to be married, but denied; c). It results in the pregnancy of the woman and the man is unwilling to marry her or there is an obstacle to marriage according to law. 2. A man who has a wife impregnates a girl (meaning he has committed adultery), but his wife does not make a complaint to sue. 3. Someone does live together with other people as husband and wife outside of marriage, even though the act is despicable and contradicts or disturbs the moral/moral feeling of the local community (Arief, 2011).

Understanding of adultery according to Article 284 of the Indonesian Criminal Code, which requires that men or women who are currently married, based on the thinking of the Dutch that adultery is a denial of marriage, which differs according to customary law with a background of desecration the values of holiness rather than intercourse. According to customary law, in intercourse it contains the values of chastity. Therefore, it is necessary to do so, namely marriage. If done outside of marriage, he is sinful and has violated the value of holiness, he has committed adultery. Therefore the creator must be punished. Indigenous Indonesians, who are generally Muslims, are not subject to monogamous principles (Chazawi, 2007).



3.2 Unregulated Adultery in the Indonesian Criminal Code

The purpose of this study is to determine the criminal liability of criminal acts of adultery according to Islamic criminal law so that it can be a comparison against the provisions of Article 284 of the Criminal Code paragraph (1) and to determine the extent of the implementation of criminal liability in Indonesia.

Islamic Shari'ah is perceived ideologically and frighteningly. There are even those who perceive the Islamic Shari'ah narrowly with the cutting-off legal institutions, stoning sentences for adulterers, the punishment of qishash for the murderers, and so on. After all, there were also many community leaders who were perceived as ulama or mujahid figures, who described a very simplistic understanding of Islamic shari'a. As a result, the perception of the false Islamic shari'a further convinced people that Islamic shari'a was indeed frightening. For example, for example, how Ja'far Umar Thalib executed his followers who begged him to be punished for stoning for adultery. In fact, Ja'far Umar Thalib himself did not have an official syar'i authority and could be held accountable for that (Asshiddiqie, 2005).

After all, what is the operational basis for applying the understanding regarding adultery law based on the Islamic Shari'a in concrete practice. For example, one cannot just read the book "fiqh jinayat" with regard to matters relating to the public interest (public law), then try to practice reading it directly without clear operational rules. All of this adds to the justification for fear that should not need to occur in the wider community, especially among those who lack understanding of Islam and moreover those who do not adhere to Islam (Asshiddiqie, 2005).

In Islamic criminal law, adultery is defined by sexual relations (intercourse) between a man and woman who is not husband and wife, it is done by adults and immature, and whether it is done on the basis of liking or on the basis of coercion (rape), and whether the adulterer is married/married or not married / not married. In short, any intercourse that is done by a man with a woman outside of a legitimate marriage relationship is classified as adultery. Whereas the Criminal Code Bill (note article 419 onwards) still "tolerates" the possibility of zina deeds according to the definition formulated above (Suma, 2004).

Regarding the matter of zina based on the Indonesian Penal Code, it can only be done if the man or woman who is bound by marriage, he is the maker of the executor. But if the man or woman is not bound by marriage, while he knows that his adultery opponent is bound to marriage, he is the maker of adultery participants, and not the maker of adultery. Because the maker of adultery must fulfill all elements of criminal acts, in casu must be in a marriage (Chazawi, 2008b).

Of course the meaning of adultery is far away by understanding the term zina in the terminology of jurisprudence. From the books of jurisprudence of the ulama can be traced what definitions they put forth about zina, both the Al-Hanafiyah school, Al-Malikiyah, Ash-Syafi'iyah or Al-Hanabilah. For more details, these are described as follows:

1. The Al-Hanafiyah School

The Al-Hanafiyah School states that the definition of zina is a sexual relationship made by a man to a woman on his genitals, who is not a slave to his

woman and is not a contract that is concerned that this definition confirms the criteria of adultery:

- a. Performed by men and women, if men do it with same-sex or same-sex women, it is not included in the criteria of adultery, even though it remains sinful.
 - b. In the genitals or vagina, if done in the rectum even though it is still unclean, it is not included in the criteria of adultery.
 - c. The woman is not a slave woman, if it is done to his wife it is also not included in the criteria of adultery.
 - d. And also not grateful (*syubhat*).
2. Ibn Hamam Al-Hanafi defines that adultery is a mukallaf who inserts his genitals even though only the tip into the female genitals that is musytaha is outside the relationship of possession of budah or *syubhat* ownership. From this definition there are several elements categorized as zina, namely:
- a. Adultery is carried out by a mukallaf, if a child or a person who is not intelligent is like a madman, not including adultery.
 - b. He put his cock even though only the tip into the female genitals, so that if there is no penetration of the penis into the vagina, although still sinful but not including the criteria of adultery.
 - c. The woman is musytaha, that is, it is indeed a natural woman to be fucked, not a corpse or a baby child who is generally not attractive to men to fuck her.
 - d. Outside the relationship of ownership of slaves or ownership. So if an intercourse woman is a slave she owns, or a woman whose marriage status is *syubhat*, not including adultery.
3. The Al-Malikiyah School
- The Al-Malikiyah School defines the notion of adultery as a sexual relationship carried out by a Muslim mukallaf, on the adami (human), which is not his slave, without being aware and done intentionally.
- a. Sexual relations: if there is no sexual relationship such as sexual intercourse, not including adultery, even though it is still prohibited.
 - b. What is done by a *mukallaf*: he means people who are acutely *baligh*. So that if the culprit is a crazy person or a small child, not including adultery.
 - c. Muslims: so that if the perpetrators are not Muslim, not including those who are subject to *hudud* punishment, namely stoning or whip.
 - d. In human beings: so if the relationship is not done to the genitals, such as the anus and others, even though it is still unclean but not including adultery.
 - e. *Adami*: means that the building belongs to a human being and not an animal. Human and animal sexual relations even though the law is prohibited, but in this context it does not include adultery.
 - f. Who is not his slave.
 - g. Without being *syubhat*.
 - h. Deliberately done.



4. Ibn Rushd who represented the Al-Malikiyah school defined the meaning of zina in the terms of the jurists (*fuqaha*) as all forms of sexual intercourse which were legal and not legal, not *syubhat* marriage and not to slaves owned.

5. School of Ash-Syafi'iyah

Whereas the school of Ash-Shafi'iyah provides a definition of the term zina as the entry of the tip of the male genitals even though part of it is in the female genitals which are haram, in a state of natural lust without being grateful (*syubhat*).

6. Ash-Syairazi from the Ash-Syafi'iyah school defines zina as a sexual relationship carried out by a man from the population of Darul-Islam to a woman who is forbidden to him, namely without a marriage contract, or a syibhu contract, or a female slave owned, in a state of reason, can choose and know the prohibition.
7. Al-Hanabilah School. The definition of the Al-Hanabilah school, namely the loss *hasyafah* of the man's penis which is *baligh* and intelligent in one of the two female holes, which has no relationship between (*ishmah*) or *syubhah* (Sarwat, 2011).

Not all people who commit adultery are punished by stoning or whipping according to Islamic Criminal Law. Only those who fulfill certain conditions are sentenced. If one of these conditions is not fulfilled, then the obligation to carry out punishment for adultery. These conditions are as follows.

1. Already *Baligh*

Only adulterers who are of sufficient age (*baligh*) are punished. If adultery is carried out by a boy who has not been *balighed*, because the semen has not yet come out, then the *hudud* law is not subject to it. Likewise, if a woman who has not yet menstruated to commit acts of adultery, then the law must be imposed upon her.

2. Understanding

Only sensible adulterers are given the *hudud* law. Whereas people who lack sane mind, are not subject to *hudud* law. A woman who is crazy if she is invited to commit adultery by a sane person, only those who are punished by *hudud* are sane, while those who are insane are not punished by *hudud*. Vice versa. In short the *hudud* law does not apply to people who lack intelligence, or are not at all understanding. A person who is sane, but deliberately drinks *khamar* to get drunk, when he is drunk he commits adultery, is not considered insane, even though this is the case. He is considered as a person who has healthy mind. So that people who intentionally get drunk and commit adultery, then he is still sentenced to *hudud*.

3. Muslims

Only adulterers who are Muslim are subject to *hudud* law. Because the Islamic zina perpetrators are required in this legal matter. Whereas if a non-Muslim man commits adultery with a Muslim woman, then the male is not punished by *hudud*, while the Muslim woman is punished *hudud*. Non-Muslim men were not sentenced to *hudud* but were only sentenced to ta'zir. Whereas both are not Muslims, so they are not punished by *hudud*, but are punished by ta'zir according

to the judge's view as a lesson for both. However, the number of scholars said that an infidel who commits adultery was sentenced to *hudud*.

4. Not Forced

Zina acts which must be subject to *hudud* law only if adultery is carried out without coercion. A person who is forced to commit adultery with dangerous threats, such as being raped or experiencing sexual violence, is not subject to *hudud* law.

5. With Humans

Only adultery committed by humans and humans is subject to *hudud* law. Whereas if adultery is carried out by a human with an animal, then the culprit is punished by *ta`zir* not by *hudud*. Whereas the law of the copulated animal is still lawful and the meat can be eaten. But Al-Hanabilah states that if the act is witnessed by at least two people, then the animal is killed, the culprit is obliged to pay the price of the animal but the meat is not halal eaten.

6. Able to engage in sexual relations

People who are physically unable to have sexual relations, for example small children, both men and women, in essence cannot commit adultery. If men have intercourse with underage women, they are not punished by *hudud*. Likewise, if an adult woman has sex with a small child who has not yet been married.

7. No *Syubhat*

Zina who requires *hudud* law to be adultery which is carried out clearly, not an accidental mistake or containing *syubhat*. Like if someone thinks the woman he has intercourse with is his wife but it turns out it's not. This is the opinion of the religious scholars. Maybe that is rare, but it is possible, because of that, the scholars insist that the person who thinks a woman is his wife, then has sexual relations, then finally found out that the woman is not his wife, so it does not include adultery which requires *hudud* law. But Imam Abu Hanifah and Abu Yusuf said they still had to be punished by *hudud*.

8. Know the Legal Threats

The culprit is someone who understands and knows that the threat of zina punishment is *hudud* which is stoning or whipping a hundred times and being exiled for a year. So if the culprit confessed that he did not know the threat of zina punishment, then the scholars differed.

9. His partner is not Kafir Harbi

A person who commits adultery with a woman whose infidel status is harbi is not subject to *hudud* law. Women who disbelieve harbi in certain cases status as captives or slaves, which in certain conditions are permitted to intercourse with them.

10. His partner is still alive

If a man has sex with a woman's corpse, the adultery is not subject to *hudud* law. Because the requirement for the fall of the *hudud* law is that the woman who



is divorced is a woman who is still alive or animate. Whereas having a corpse has its own laws (Sarwat, 2011).

In Indonesia, adultery committed by children (both underage and not tied to a marriage rope), cannot be said to be a crime of adultery as stipulated in Article 284 of the Criminal Code (Hidayat, 2010). So that, there is no legal sanction for the makers of these actions based on positive criminal law? And what about the perspective of Islamic Criminal Law?

Zina criminal acts in Islamic Criminal Law are different from zina criminal acts in Indonesian Criminal Law. Islamic Criminal Law considers every relationship of the body which is forbidden as adultery and the perpetrator must be punished, both the perpetrator of the person who is married and not yet, whereas the Indonesian Penal Code does not consider any relationship of the body that is forbidden as adultery.

Japan and almost all of Europe have revoked the settlement offenses from their Criminal Code because they are seen as victimless crime, while in Indonesia it has been expanded. In addition to clarifying the meaning of settlement and adultery, the criminal threat was raised from a maximum of nine months to five years in prison. With the current concept of the Criminal Code, adultery offenses can only be imposed on those who are married. The Criminal Code cannot ensnare adultery by young couples on the basis of liking. But now, with the entry of a new article in the Draft Criminal Code, the young couple was convicted. This is the adoption of the Islamic view of adultery. The drafting team included this rule because they saw the impact of the many young people who were pregnant out of wedlock (Suherman, 2008).

Adultery is voluntary sexual intercourse between a man and a woman who are not married to each other, but, one of whom at least is a married person (Gaffney-Rhys, Barton, Hibbs, & Booth, 2013). Prohibition against adultery is widely recognized since it breaks the sacred covenant of marriage (Rae, 2012). Consequently, adultery is often a component of divorce (Barbare, 2012). Adultery is to destroy the integrity of that relationship (Bray, 2012). Thus, there is no chance of decriminalization for adultery behavior. Decriminalising adultery will destroy sanctity of marriage (Tiwari & Dwivedi, 2019).

The Prophet say: Allah has determined that adam's children tend to commit adultery. This desire is inevitable, namely to commit adultery in the form of vision, adultery of the mouth in the form of narrative, adultery feelings through ideals and the desire to get it. However, it is the genitals who determine in adultery or not (Ali, 2007). It should be that Indonesia as the world's largest Islamic population conducts a reconstruction of the development of national laws that respect the majority community by not excluding other communities from non-Muslim groups. In reconstructing Islamic law in the context of Indonesianness it is a challenge for Islamic jurists, all Muslims, and Muslim politicians to make positive law in legislation (Suherman, 2008).

4. CONCLUSION

The Indonesian Penal Code does not view all non-marital sex relations as adultery. According to the Indonesian Criminal Code, adultery can only occur if sexual relations outside of marriage are carried out by people who are already married. In addition, adultery

in Indonesia cannot be threatened with punishment if there are no complaints from the victim who feel insulted or harmed, namely the husband or wife of the perpetrator. There should be no need for the wider community, especially among those who do not understand Islam and especially those who do not adhere to Islam, which states that punishment for adultery is a very cruel punishment (especially for adulterers who have been married) because of proof against adultery itself is very difficult (it must be witnessed by four adult men who see firsthand the occurrence of intimate relations), except when the perpetrator acknowledges his own actions. Furthermore, starting from the author and the reader, the author recommends avoiding adultery even though Indonesian Positive Criminal Law does not provide punitive sanctions such as Islamic law because as a believer, it must be believed that there is a day of revenge for sinful humans.

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