

Adultery in Perspective of Indonesian Criminal Law and Islamic Criminal Law

Miswardi

Universitas Islam Negeri (UIN) Sjech M.Djamil Djambek Bukittinggi, Indonesia
miswardiw@yahoo.com

Abstract

As a country that adheres to the Pancasila ideology, and places the precepts of divinity as the first precept of Pancasila, Indonesia should be a religious country that is thick with religious nuances, and free from heinous acts and evil deeds. But in fact, Indonesia is currently experiencing moral degradation and no longer reflects religious values. This is marked by a statement of actions that violate religious norms and state rules. One example is the problem of adultery that knows no age and social status. In fact, regarding this issue there are indications of omission and protection, because so far there has been no legal certainty in its resolution. Furthermore, in legal disputes the issue of adultery is actually included in the complaint offense. Of course, this problem has bad implications for its identity as a religious nation. Therefore, it is not wrong if the role of Indonesia's national criminal law is questioned by many parties. On the one hand, we believe that criminal law is the ultimum remedium as a controller or regulation of criminal acts. In social reality, throughout the history of human civilization, adultery has never stopped, even now it is growing and the perpetrators come from various circles and layers of society, which are not limited by age and profession. Therefore, this paper will analyze how the law actually anticipates this phenomenon, both in the perspective of Indonesian national criminal law and Islamic criminal law.

Keywords

adultery; law; kuhp and islam



I. Introduction

Indonesia as a legal state where the majority of the population is Muslim, where in addition to the enactment of national law that has been stipulated by the state as general law, customary law and religious law are also applied in society as special law, in accordance with the applicable legal principle, namely *lex specialist derogat lex generalis*. This principle means that the special law adopted by the community also applies in the Indonesian legal state as a means to provide justice protection to the community, as a manifestation of the constitution, namely the 1945 Constitution, which is expressly stated in Article 28 paragraph (1) letter g, providing guarantees of protection to each individual or family in the form of protection of the honor, dignity and property owned..

In this context, the existence of the state becomes very important in people's lives, to provide protection for the security and comfort of the community in the context of social justice. Community protection is accommodated through various forms of legislation and laws that are enforced on the principle of equality before the law without exception.

Although theoretically Indonesian law has accommodated various values that grow and develop in society, it does not mean that Indonesian people are free from social problems, such as one of them that never runs out and becomes a scourge in people's social life is adultery, and will even exist throughout the history of human life, due to the fact

that these acts have always existed from the start, even though both traditional, religious and legal institutions have explicitly regulated prohibitions and sanctions, but these actions will always exist, even though the impact of these actions both socially and religiously has been known by the public large. So that normatively both in national criminal law and in Islamic law prohibitions and sanctions for these acts have been regulated explicitly, although in the two norms there are differences in understanding and sanctions, in essence the two legal norms have the same view that adultery is an act of adultery which is not commendable that must be abolished.

In addition, in the customary law of the people in Indonesia, prohibitions and sanctions for adultery have also been strictly regulated. In Islamic law regarding the prohibition of adultery, it is even stricter, let alone committing adultery near the act of adultery, it is not permissible, as stated in the letter al-Isra verse 32 which reads which means “ *and do not approach adultery; (zina) is truly a heinous act* ” with the threat of a very severe punishment, and even having to be stoned to death; Thus it appears that Islamic criminal law also has very strict rules on the practice of the act of adultery. Because the principles contained in Islamic values and teachings clearly state that adultery is an act of great sin if committed by Muslims, because the consequences of these actions are not only detrimental to their legal husband or wife but furthermore. rather than that it will greatly affect the children born as a result of adultery, both social and religious impacts, so it is not wrong if Allah forbids these actions to be carried out by human beings.

In Indonesian criminal law the provisions governing adultery can be found in Article 284 of the Criminal Code (KUHP). From these two legal perspectives, It can be seen that the issue of adultery is a very serious problem and has existed for a long time which has been very troubling to society throughout the ages. Therefore, this issue of adultery needs to be studied in two perspectives, namely from the perspective of national criminal law and the perspective of Islamic criminal law.

II. Research Method

The data collection technique and methodology used in this research is the library research method, namely library research, where the library method is research conducted by reading books or magazines as well as other reference sources in journals and other data sources in the library related to adultery in the study of criminal law in Indonesia and Islamic Criminal Law. The steps used in library research according to Mirshad (2014) are: 1. Record all findings regarding "research problems" in each research discussion obtained in the literature- literature and sources, and or the latest findings regarding the “research problem” 2. Integrating all findings, both theories and new findings 3. Analyzing all findings from various readings, relating to the shortcomings of each source, the advantages or relationships of each about the discourse which is discussed in it. 4. Criticizing, providing critical ideas in the results of research on previous discourses by presenting new findings in collaborating different thoughts on research problems

III. Results and Discussion

Today's social reality in people's lives in general, especially in Indonesia, has experienced a shift in values. For example in the act of adultery, clearly prohibited by customary, religious and legal values and considered a disgraceful act is now no longer considered a shameful disgrace. It is also no longer seen as an act of disobedience, as if the act is considered as something that is commonplace, because some people no longer really

care that the act is an act that violates cultural values and religious and legal values. The indicators of all of this can be seen from the rise of nightclubs, discotheques, hotels that provide facilities for committing immoral acts, the increasing number of cases of illegal abortions, the disposal of babies, the high rate of divorce due to infidelity and adultery today, which perpetrators are also not limited to a certain age and social status. Education and skills are the main keys in gaining social status in community life (Lubis *et al*, 2019). Simply put, everyone has the same opportunity to commit adultery, the only problem is, some are known to the public and some are not caught, there are also cases that get to court and some don't.

The rise of adultery in Indonesian society today is inseparable from the influence of the development of science and technology which has an impact on the degradation of ethics and morality among the community. This has resulted in the act of adultery which was previously considered a very shameful act of disgrace, now seems to be a common thing. This situation is also caused by the no longer consistent implementation of customary sanctions against adulterers.

On the other hand, the existence of the law itself as the highest institution which is expected to be the last bastion to eradicate or at least anticipate the prevalence of adultery in the community, seems unable to do much. This is because the law applied to adulterers in the community is very far from sanctions that make the perpetrators deterrent and other people are afraid to do the same thing as the real essence of punishment, namely to deter perpetrators and scare people who have not done it.

We can easily find proof of the phenomenon from various kinds of media reports, which even almost every day from each media report on adultery incidents, whether organized or not, for example news about raids on hotels, guesthouses, entertainment venues, massage parlors and so on. etc., this has proven that the prevalence of adultery in Indonesia is no longer a figment.

The rise of adultery in Indonesia today has deeply disturbed various circles, especially the ulama. Even though Indonesia is not an Islamic state, the majority of the Indonesian population is Muslim, who sees the prevalence of adultery as an immoral act that invites disaster in the community. In addition, the rise of adultery in the community also injures Pancasila as the ideology and philosophy of the Indonesian state, where the first principle expressly states "Belief in the Almighty" the meaning contained in the word is that the Indonesian nation is a very religious nation.

It is very contradictory for Indonesia as a country where the people are known for their religious life which is very strongly supported by the philosophy and ideology of the state in the midst of society where adultery is rampant not perfect.

3.1 Adultery in the Perspective of National Criminal Law

The definition of adultery in the National Criminal Law is very much different from the meaning of adultery in Islamic law, because adultery in the National Criminal Law as stated in Article 284 of the Criminal Code, it can be concluded that it is an act of husband and wife relations between one man and one person a woman who is not bound by marriage where one or both of them are bound by marriage to another party.

When viewed from the explanation of Article 284 of the Criminal Code, adultery is defined as a sexual behavior carried out by a man with a woman where one or both of them are bound by marriage to another party, so that the act of adultery can only be prosecuted when there is a complaint from the husband or wife who commits adultery, because he feels wronged. Therefore, the act of adultery in the Criminal Code is included in the category of complaint offense (*clacht offense*). The legal consequences if the complainant

(husband/wife) who is harmed withdraws his complaint, the state, in this case the law enforcement apparatus, can no longer continue the examination (investigation and prosecution).

If analyzed in depth the meaning of adultery as contained in the Criminal Code, then an act that is categorized as an act of adultery is only a sexual act committed by those who one or both of them have a marriage bond with another party, while a sexual act is committed by a man and a woman, both of whom are not married to other parties, cannot be categorized as adultery. Furthermore, in the provisions of the Criminal Code.

The complaint offense in adultery is included in the category of absolute complaint offense, where the complaint cannot be separated, for example, only a man complains about his wife's adultery, if the husband wants to complain about his wife's adultery, the husband must also complain to his wife and vice versa if his wife wants to complain about her husband for adultery, then she must also complain about her husband, cannot only complain about the woman against her husband's adultery. Meanwhile, if the person reporting the adultery is not married to the person who committed adultery, then the adultery cannot be processed under formal criminal law, based on the Criminal Code.

If we trace to why the provisions in the Criminal Code are like this, because the cultural basis of the Criminal Code is very different from the cultural foundation of Indonesian society, where the Criminal Code is converted from the Dutch *final code*, where the Dutch community culturally adheres to the individual principle while the Indonesian society adheres to the communal principle. In individual principles, individual freedom is the main goal, so that when sexual relations carried out by two men and women who have no marriage ties with other parties, it is considered as individual freedom that does not harm the other party. This is different from the communal culture adopted by the Indonesian people where individual freedom is also limited by social values that are agreed upon in society. Therefore, when a person commits an act which he thinks is his individual freedom but is contrary to the agreed social values, then the act is also categorized as a wrong act.

In the science of Indonesian criminal law, each article contained in the criminal law has elements as a condition for it to be said that the act is wrong, and the provisions of the criminal law apply to it.

In the context of the Criminal Code for adultery as regulated in Article 284, it can be seen that there are at least three important elements that must be met for a new act to be categorized as an act of adultery, namely:

- The act was carried out by a man and a
- a. Women who are not bound by a marriage.
 - b. For the perpetrator or one of them applies Article 27 BW or has been bound by marriage to another party.
 - c. One or both of them are in marital status with another party.

From these elements, it can be clearly understood that the most important thing in an act that can be categorized as an act of adultery is the attachment of one or both of them to the provisions of Article 27 BW. so as stated above that sexual acts committed by a man and a woman which have nothing to do with Article 27 BW or in other words between a single man and a woman, cannot be categorized as adultery as regulated in in Article 284 of the Criminal Code. Therefore, such persons cannot be sentenced to criminal penalties as regulated in the Criminal Code.

However, as stated above, even though the provisions of Article 284 of the Criminal Code regarding adultery are categorized as a complaint offense (*clacht delict*), it is an absolute complaint offense (*clacht delict*), meaning that in the act of adultery it is not allowed to defend one of the people who will be accused of committing adultery. In the application of Article 284 of the Criminal Code against adultery perpetrators, it is not allowed to defend one of the adulterers. It means that complaints against the crime of adultery must be made against both parties, both the man and the woman, so if the complainant is the husband of the woman who commits adultery, then he must also complain to his wife and vice versa, if the complainant is the wife of a man. the man who commits adultery, then the husband must also be processed the same way, the husband of the woman who commits adultery can only complain of a man against his wife's adultery while his wife is not reported, and vice versa, meaning that men and women who commit adultery will be the same processed whether on a complaint from a female husband who commits adultery or a complaint from a male wife who commits adultery. Even if one of the perpetrators of adultery will not be prosecuted later, this is an opportunity that is owned by the prosecutor. Thus, if the adultery occurs with the consent of the husband and wife, for example, her husband is a pimp who sells his wife and his wife is also willing to do so, then the act cannot be punished, because basically the prohibition of adultery in the formal criminal law is only to protect marital bond.

So that people who commit adultery can be convicted, it must also be based on the intention of the perpetrator. Because if the act is not on purpose, then the perpetrator cannot be convicted and the judge must release him, but in the Criminal Code itself there is no explanation in terms of how adultery can be categorized as unintentional. Things like this can be used as one of the weaknesses of the Criminal Code in solving adultery problems that occur in Indonesia.

Another requirement that is important to note is that adultery cannot be punished when the adultery occurs with the consent of the husband and wife, for example, a husband works as a pimp while his wife becomes a prostitute. In the Criminal Code, such acts are not included as acts of adultery, and cannot be punished.

3.2 Adultery in the Perspective of Islamic Criminal Law

Adultery in Islamic law is a major sin so that it is forbidden to even approach it, as stated in the letter Al Isra' verse 32 . The word adultery comes from the Arabic language, namely *zanaa -zinaa-aan* which means *atal mar-ata min ghairi 'aqdin syar'iiyin aw milkin, sexual* intercourse with a woman without a marriage contract according to *syara'* or because of slaves, although many scholars provide the definition of adultery which are different from each other but have the same meaning. By Abd. Kadir Audah, adultery is interpreted as a forbidden sexual act, namely the act of a man inserting his genitals into the genitals of a woman who has no marriage ties, either completely or only partially (*iltiqa al-khitanain*)

Referring to the opinions of the two experts, it can be understood what is meant by adultery in the context of Islamic law, namely an act committed by a man who inserts his genitals into the penis in the genitals of a woman who is not his wife, or there is no marriage bond. Another understanding that can also be concluded from the two opinions above and refers to many Islamic references, it is clear that there is a clear difference in the meaning of adultery in national criminal law and the meaning of adultery in Islamic law.

Because national criminal law defines adultery is only an act of husband and wife relations carried out by a man and a woman who does not have a marriage bond in which one or both of them have a marriage bond with another party, meaning that if one or both

of them are not married to another party, then the act is not included in the category of adultery. Unlike the case with Islamic law, all acts of conjugal relations carried out by a man and a woman who have no marriage ties are acts of adultery, regardless of whether one or both of them have marital ties with the other party or not.

In Islamic law, adultery is grouped into two. The first is called adultery *muhsan*, which is adultery committed by men and women who are both married to other people. Both adultery *ghairu muhsan*, namely adultery committed by people who have never been married. The grouping of adultery into these two groups will distinguish the sanctions against the perpetrators, for example against the adultery of *muhsan* both men and women will be given a hundred lashes / lashes and also stoned to death by stoning in the presence of many people, as described in Al-Qur'an s letter Annur verse 2,

لَزَانِيَةٌ لِّزَانِي فَاعْلَدُوا لَّ اِنَّهُ فِي دِينٍ لَّدَّةٌ لَا بِهِمَا لِلَّهِ لَيَّوْمَ لَّاخِرٍ لِّيَشْهَدَ اَبَهُمَا الْمُؤْمِنِينَ ٢

Meaning: "The woman who commits adultery and the man who commits adultery, then lash each one of them a hundred lashes and do not have mercy on both of them preventing you from (practicing) Allah's religion if you believe in Allah, and the hereafter and let their execution be witnessed by a group of believers who believe." (Surat an-Nur: 24:2)

In a literal sense, adultery is the same as *fahisyah* or a heinous act. Meanwhile, in the sense of the term, adultery is a sexual relationship between a man and a woman, who are not bound to each other in a legal marriage relationship. As the opinion of Abdul Qadir 'A already stated that adultery is a forbidden sexual relationship, namely inserting the male genitalia into the female genitalia, either completely or partially (*iltiqa' al-khitain*).

In line with this opinion, another opinion also says that what is said to be adultery is the meeting of male and female genitals. At least with the sinking of the shoots of the penis in the female genitalia. And if the male genitalia does not have a testicle, then the strongest opinion says that the penis does not reach an erection.

From the two opinions above, it can be concluded that adultery in Islamic law is intercourse carried out by men and women who have no relationship or marriage bond. With some of the opinions mentioned above, the understanding of adultery between national criminal law and Islamic criminal law has a very clear difference. Criminal law defines adultery as an act of sexual intercourse outside of marriage, which is carried out by humans of the opposite sex and both are adults and one or both of them are bound by marriage to another person.

Meanwhile, in Islamic law, it is never distinguished whether the person committing the adultery is married or not. Even though the person who commits adultery has never been married, the act is still classified as an act of adultery. Meanwhile in criminal law it is not like that.

The act of adultery in Islamic law is unlawful, there is no difference between scholars in this regard. Even adultery is considered a despicable act, vile and includes a major sin. Muhammad al-Khatib al-Syarbani said that adultery is a heinous act, and there is no religion that justifies it. The sanctions received by adulterers are severe sanctions.

The arguments for the prohibition of adultery in Islamic law can be found in the Qur'an as well as in the hadith of the Prophet Muhammad. In QS An Nur verse 2, it is very clearly emphasized how the prohibition and prohibition of adultery. In addition, it is also contained in the same letter, the next verse, namely:

لَزَّانِي لَا إِلَّا نِيَّةً لَزَّانِيَّةً لَا لَا إِنْ لَكَ لِي لِمُؤْمِنِينَ

It means "A man who commits adultery does not marry but a woman who commits adultery, or a woman who is idolatrous; and the woman who commits adultery is not married except by a man who commits adultery or a man who is polytheist, and that is forbidden to the believers." (Surat an-Nur: 3)

Not only in the Qur'an alone, several hadiths also emphasize how strict the prohibition of adultery is, such as:

لا الزاني

Meaning: "Adulter is not said to believe when he commits adultery". (Narrated by Bukhari Muslim)

أَلْ لِيهِ الصَّلَاةُ السَّلَامُ: أَلْ الشِّرْكَ أَعْظَمُ اللَّهُ أَلْ لَا لُ لَهُ

This means that the Prophet sallallaahu 'alaihi wa sallam said: "There is no sin after polytheism that is greater (sin) in the sight of Allah than the sperm that is placed by a man into the womb (of a woman) which is not lawful for him." (Narrated by Iman Ibn Abid Dunya from Al-Haitsam bin Malik Ath-Tha'i)

From the verses and hadiths described above, it actually shows people, and those who believe in particular. That adultery is a very heinous act. Even the sanctions given are not only sanctions in the world. But in the hereafter also given very painful sanctions against those who commit adultery.

Based on this, then in Islamic law also considers that adultery is an act of destroying religion and damaging the soul, damaging the mind, destroying offspring, and destroying property. When the five basic principles have been damaged, there will be damage and chaos, causing big problems in the midst of mankind.

That is why Allah SWT ordered humans to marry and forbade adultery. Because in principle, the marriage aims to maintain religion, maintain honor, protect oneself and protect offspring. This can be seen from the Word of Allah SWT in the Qur'an:

لَّذِينَ لَا إِلَهَ لَهَا آخَرَ لَا لُونَ لِنَفْسٍ لَّتِي لِلَّهِ لَا لَحَقَّ لَا لَكَ لَقَ أَمَا ٦٨

Meaning: "And those who do not worship other gods along with Allah and do not kill the soul which Allah has forbidden (killing) except with a right (reason) and do not commit adultery, whoever does that, surely he will get (retribution). sin (his)". (Surah Al-Furqon: 68)

Furthermore, if the crime of adultery is investigated in Islamic law. So Islamic law provides punishment based on the subject of the perpetrator. And the subject of adultery is made into two categories based on the subject. First, the crime of adultery muhsan, this crime is aimed at the perpetrators of adultery who are already tied to the ropes of marriage, is the criminal act of ghairi muhsan, which is devoted to people who commit adultery where they are still girls or bachelors who have never been bound by legal marriage ties.

As for the sanctions for adulterers, ghairu muhsan itself, it can be seen based on the Word of Allah SWT in Surah An-nur: verse 2 as explained above, namely being given a hundred lashes / lashings and also stoning to death by stoning. Meanwhile, the sanctions given to the adulteress of Muhsan are subject to the same punishment and are added to the punishment of stoning. The punishment for stoning is stoning the perpetrators of adultery with stones until they die.

اِخْذُوا مِنَ اللَّهِ لَهْنًا لَا الْبُكَرُ الْبُكَرُ لَدُنَّ الشَّيْبِ الشَّيْبُ لَدُنَّ اِنَّهُ الرَّجْمُ .

"Take it from me, take it from me. Indeed, Allah has given them another way. That is, people who are not married (adultery) with people who are not married (adultery) and people who are not married (the law) are lashed 100 times and exiled for a year. As for those who are married (adultery) with a married person (adultery), lash 100 times and be stoning.

There is a difference in the provision of sanctions between the perpetrators of adultery muhsan and ghairu muhsan because the perpetrators of adultery muhsan are considered to have seriously exceeded the limit. For this reason, the maximum punishment must be given, namely by applying the punishment of flogging and stoning. Meanwhile, at the same time with the threat of severe sanctions for the perpetrators. Muhammad al-Khatib al-Syarbani said that adultery is a heinous act, and there is no religion that justifies it. The sanctions received by adulterers are severe sanctions.

The meaning that can be drawn from the understanding of the verses of the Qur'an and the Sunnah of the Prophet Muhammad SAW above is that in the context of Islam adultery is an act that is strictly prohibited by Allah and is included in the category of major sins after polytheism, even sanctions against such acts are not only sanctions in this world, but in the hereafter also given very painful sanctions against those who commit adultery.

لَّذِينَ لَا إِلَهَ لَهَا آخَرُ لَا لَوْنَ لِنَفْسٍ لَّتِي لِلَّهِ لَا لِحَقٍّ لَا لَكَ لَقَ أَمَا ٦٨

Meaning: "And those who do not associate Allah with worshipping other gods along with Allah and do not kill a soul which Allah has forbidden (killing) except with a right (reason) and does not commit adultery, whoever does that, surely he will receive (retribution) for (his) sins." (Surah Al-Furqon: 68)

The strict prohibition against adultery in Islam is not only a religious prohibition, but also pays more attention to the impact of adultery from various aspects of human life because the act of adultery will damage the soul, mind, lineage and property. These damages will have a greater social impact in society and mankind, therefore the prohibition of adultery in the teachings of Islam is also a preventive measure against various crimes that will arise in the future. That is why Allah SWT ordered humans to marry and forbade adultery. Because in principle, the marriage aims to maintain religion, maintain honor, protect oneself and protect offspring. Meanwhile, the punishment for adultery with ghairu muhsan is one hundred lashes and one year of exile.

Regarding the act of adultery in Islamic law, both the act of adultery of muhsan and adultery of ghairu muhsan, is a heinous act and a great sin, so that in the holy book al-qur'an many verses are found which explicitly Allah warns mankind not to do this act.

In imposing sanctions on adultery, Islam places more emphasis on the subject of the perpetrator, which as explained above is based on two categories, namely adultery muhsan and adultery ghairu muhsan. The difference in terms of giving sanctions between the perpetrators of adultery muhsan and ghairu muhsan is due to the perpetrators of adultery muhsan being considered to have committed very immoral acts, because apart from having committed acts that are prohibited by Allah swt, they have also betrayed their respective partners, therefore it is already should be given the appropriate punishment, namely by applying the punishment of flogging and stoning. As for the perpetrators with the status of ghairu muhsan, they are given flogging 100 times and was exiled for one year.

IV. Conclusion

Adultery between national criminal law and Islamic law there is a very basic difference. The difference is motivated by the definition of adultery. In the view of national criminal law, adultery is defined as an act of sexual intercourse outside of marriage, which is carried out by humans of the opposite sex and both have grown up and one or both of them are bound by marriage to another person. Meanwhile, Islamic law does not require marriage as a condition to be categorized as adultery. However, Islamic law provides different sanctions against adulterers who are married and those who are not married. For adulterers who are married, they are given a sanction in the form of 100 lashes and stoning to death. Meanwhile, adulterers who are still girls and bachelors are given 100 lashes and are exiled for one year.

References

- Ali, Zainudin. (2019). *Islamic Criminal Law*. Jakarta: Ciputat Press.
- Al-Qur'an and Hadith
- Bahiej, Ahmad. *Juridical Overview of Adultery Offenses (operspel) in Law*
- Dahlan, Abdul Aziz. (1996). *Encyclopedia of Islamic Law*, Volume four. Jakarta: New Ichtiar Van Hoeve.
- Husaini, Adi. (2006). *Christian-Western Hegemony in Islamic Studies in Higher Education*. Depok: Echo of Insasi.
- Indonesia Dictionary
- Indonesian Criminal. *Journal: Socio Religion*. Vol. 2. No. 2. February 2003
- KUHP and KUHAP and their explanations, first print. Bandung: Citra Umbara. 2006
- Lubis, R., et al. (2019). *Survival Strategy for Lokan Seekers in Paya Pasir Village, Kec. Marelan, Medan, Indonesia. Budapest International Research and Critics Institute-Journal (BIRCI-Journal)*. Volume 2, No 1, Page: 293-303.
- Marpaung, Leden. (1996). *Crimes Against Morality and Problems of Preference*. Jakarta: Sinar Graphic.
- Masyrofah, Nur Irfan. (2018). *Fiqh Jinayah*. Jakarta: Azmah.
- Soesilo, R. (1996). *The Criminal Code and its Complete Commentaries Article by Article*. Bogor: Politea.
- Well, Abdul Qadir. (2007). *Encyclopedia of Islamic Criminal Law*. Jakarta: Charisma of Science.