

## Review of Islamic Law and the Criminal Code Against the Practice of Adultery

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### ABSTRACT

Punishment has also been determined This article aims to describe the review of Islamic law and the criminal law code against the practice of adultery. A very bad act not only from an Islamic point of view but also from the point of view of the Criminal Code. However, by using the method of comparative analysis found differences between Islamic Law and the Criminal Code in defining the term adultery and its legal consequences. Sexual relations between young couples are not categorized as adultery in the Criminal Code because they are not currently in a legal marriage bond. The Criminal Code also does not ensnare adulterers who do not comply with Article 27 BW even though they are in a legal marriage bond. In addition, if the husband or wife of the adulterer gives permission to his partner to commit adultery, then Article 284 cannot prosecute him. Meanwhile, in the view of Islamic law, every sexual relationship outside of legal marriage ties is categorized as an act of adultery, and the in the Koran

## INTRODUCTION

The desire for sexual intercourse or sexual libido is an instinct that exists in humans to enjoy that relationship as well as an effort to develop sex. This instinct also exists in animals. It's just that, in humans who are more dominant is to enjoy sex rather than develop types. Therefore, this instinct cannot be dammed without the right solution. Libido sexuality is a drive for sexual desire from within the human being, while the shape of the body, voice, gestures, and clothing of the opposite sex are external stimuli that arouse this sexual desire. As a result, many people commit adultery because they are not strong enough to resist the stimulus to indulge their desires. In general, adultery is defined as sexual intercourse committed by a man and a woman without a valid marriage bond. Meanwhile, the notion of adultery in the Western world is defined as intercourse in which one of the perpetrators or both perpetrators is married to another person. So if the intercourse is carried out by people who are both not bound by marriage, then it cannot be punished as an act of adultery. Meanwhile, according to Muslims, adultery is sexual intercourse between a man and a woman who are not bound by each other in a marriage relationship, so whoever they are if they have intercourse with someone who is not their husband or wife, they are punished with adultery. Ironically, the notion of adultery in the Criminal Code still follows Western thinking. This happened because the existing Criminal Code was inherited from the Netherlands (Istianah, 2015).

Meanwhile, Indonesian society is a religious society which of course has very different thoughts from the Western mindset regarding adultery. It can be seen that the Criminal Code is still not in accordance with customary law or the adopted culture. Indonesia is not a secular country, because religious values greatly influence daily life, therefore the formulation of a criminal act on decency should incorporate the religious values of adultery, for example, which is a crime involving a person's honor that should be severely punished but in fact the Criminal Code only carries the maximum penalty 9 months in prison and even then must fulfill several conditions, including in article 284 of the Criminal Code it is explained that a man or woman is said to have committed the crime of adultery, if three conditions are met, namely: having intercourse with a woman or a man who is not her husband or wife ; Article 27 BW applies to him. He is currently in marriage. This is certainly different from Islam which does not distinguish whether the offender is married or not. Adultery according to Islam is intercourse carried out by a partner who is not bound by a valid marriage. The perpetrators of adultery are divided into two, namely adultery muḥṣan and ghair muḥṣan. Adultery muḥṣan is an adultery committed by a person who is mature, intelligent, independent and has been legally mixed with someone of another sex. In other words, muḥṣan adultery is adultery in which the perpetrator is married. Meanwhile, ghairmuḥṣan adultery is adultery committed by a person who has never entered into a legal marriage. In terms of determining the punishment, there are differences between the two. If the perpetrator of muḥṣan is sentenced to stoning, then the perpetrator of ghair muḥṣan is sentenced to 100 lashes or volumes and then exiled. As mentioned in Q.S. al-Nūr (24): 2. "The woman who commits adultery and the man who commits adultery, then lash each one of them

a hundred lashes, and let not mercy on them prevent you from (carrying out) the religion of Allah, if you believe in Allah, and the Hereafter, and let (the implementation of) their punishment be witnessed by a group of believers."

This verse clearly explains the punishment that must be given to the perpetrators of adultery. However, Islamic law is very different from the Criminal Code. Even though we know that in general law is a series of rules that are mutually agreed upon to regulate society in a coercive nature and there are sanctions for violators. The law will regulate people's lives with very simple and limited rules which then develop in line with the development of that society. These legal principles will continue to grow and the theories will continue to develop in line with the increasing and varied needs of society and the advancement of thought, science and civilization. Law will develop rapidly when the social order also develops rapidly. This means that it is society that creates law according to the needs in regulating life between them. Laws like this continue to develop which are related to the development of society. However, in contrast to customary law which can change quickly when the community wants change, positive law takes a long time if it is to change, even though it is felt that it is no longer appropriate to be applied in the midst of society, because there are codified elements. As is the case with Article 284 of the Criminal Code which discusses the crime of adultery, it is felt that it is not appropriate to be applied in Indonesia. How could it not be, adultery which is one of the criminal acts of decency explains that adultery can only be criminalized if the perpetrator is married, subject to Article 27 BW and is a crime of complaint which is considered to be very contrary to Islamic law. Starting from the problems above, the author will examine (Agustiawan, 2016).

## LITERATURE REVIEW

### 1. Muhsan adultery

Muhsan adultery is adultery committed by men and women who are already married. The perpetrators of adultery muhsan will receive severe punishment from the community and in accordance with the Shari'a. The basis for determining the law of stoning is the hadith of the Prophet which means: "Take it from me, take it from me. Verily, Allah has provided another way for them, namely people who are not married (adultery) with people who are not married, (the law is) 100 lashes and exile for a year. As for people who are married (adultery) with people who are already married (the law) lashes 100 times and stoning.

### 2. Zina Ghairu Muhsan

Zina Ghairu Muhsan is adultery committed by unmarried men and women. The perpetrator of adultery Ghairu Muhsan will be punished with one hundred lashes and exile for one year. The explanation regarding the punishment for adultery is contained in the word of Allah SWT in Al-Quran Surah An-nur verse 2 which means: "The woman who commits adultery and the man who commits adultery, then lash each one of them a hundred lashes, and let no compassion for them prevent you from (carrying) Allah's religion, if you believe in Allah, and the Hereafter, and let (the execution of) their sentence witnessed by

a group of people who believe."This verse describes the firmness in enforcing the hadad punishment, the prohibition against giving mercy in imposing the punishment for the atrocities committed by the two adulterers, and also prohibiting the annulment of the hadad punishment or being gentle in enforcing it. Therefore it is prohibited to delay the enforcement of Allah's religion and to withdraw His rights. The execution of the punishment should be carried out in front of a large audience, namely a group of believers, so that it is expected to give a deterrent effect and this verse describes the firmness in enforcing the hadad punishment, prohibiting giving mercy in imposing punishment for the abominations committed by the two adulterers, as well there is a prohibition against canceling hadad punishment or being gentle in enforcing it. Therefore, it is prohibited to delay the enforcement of Allah's religion and to relinquish His rights.(Sanksi & Pidana, 2022).

The execution of the punishment should be carried out in front of the general public, namely a group of people who believe, so that it is expected to give a deterrent effect and affect the souls of those who have committed adultery and teach a lesson to those who witness the execution of the punishment. There are differences in the procedure for carrying out flogging. According to Imam Malik, it was the back and surroundings that were beaten, and they had to take off their clothes. According to Imam Syafi'i, all limbs are beaten, except for the genitals and face, which must be avoided and stripped of clothes. According to Abu Hanifah, all members of the body, except for the genitals, face and head and stripped of clothes. In addition to being beaten a hundred times, the perpetrators of adultery *ghair muḥṣan* are also exiled for a year, this is based on the statement of Ibn al Munzir who said: Rasulullah saw. Swearing that he would decide based on the Book of Allah. Then he stated that the servant must be punished with a hundred lashes and exiled for one year. That is the elaboration of the word of Allah and that is what Umar bin Khattab delivered a speech on the pulpit and which was then practiced or practiced by the *Khulafā' al-Rāsyidīn* and agreed to it. This is the basis of *ijma'* (consensus) (Shell, 2016).

## **METHODOLOGY**

This study uses research methods that are normative juridical. Normative juridical research is research that examines various laws and regulations that apply or are applied to a particular legal issue. Normative legal research is often referred to as doctrinal legal research, namely research whose object of study is statutory regulatory documents and library materials. This research data collection tool is through library research in order to collect all information relevant to the topic or problem being researched. This information can be obtained from scientific books, research reports, regulations, written sources both in print and electronic form. The library research materials consist of primary materials and secondary materials. Primary legal materials include legal products which are the object of study and legal instruments which are the tools of analysis. Meanwhile, secondary legal materials are legal materials that provide an explanation of primary laws such as research results or opinions from legal experts.

## RESULTS AND DISCUSSION

Intercourse that is called adultery is intercourse in the vagina, in which the male genitalia (testicles) enter the female genital organs (farji), just as an eye patch is inserted into the eye shadow. The size is if the head of the male genitalia (hasyafah) has entered the vagina even a little. It is also considered adultery even if there is a barrier between the penis and the penis as long as the barrier does not hinder the feelings and enjoyment of intercourse, and also the intercourse that occurs is not one's own. However, if intercourse with his property is even though it is forbidden, such as intercourse with a wife who is menstruating, giving birth and fasting during Ramadan, then it is considered adultery. This element is fulfilled if the offender has intercourse even though he knows that the woman he is having intercourse with is a woman who is forbidden for him. If a person does not know that his actions are prohibited, then he cannot be subject to a hadd punishment, like someone who is married to a woman who is still married, but it is kept secret from her. Adultery is a criminal act that is punishable by hudud or had, namely a punishment imposed on violations involving the rights of Allah. Thus, the punishment for the crime of adultery has been regulated by the Qur'an because it is the absolute right of Allah SWT.

### 1. The Islamic View of the Prohibition of Adultery

The word adultery comes from the Arabic language, namely zanaa-yazni-zinaa-aan which means atal mar-ata min ghairi 'aqdin syar'iiyin aw milkin, which means having intercourse with a woman without knowing the marriage contract according to syara' or because the woman is a slave. Adultery according to fiqh is intercourse between a man and a woman without a valid marriage bond, namely inserting the male genital into the female genitalia, at least up to the limit of hasyafah (testicle head). Where the penis in the penis is like a celak stick in a bottle of celak or like a bucket in a well. Intercourse is considered adultery, at least by the immersion of the hasyafah (testicles) in the vagina, or something similar to hasyafah if the penis does not have hasyafah, and according to a strong opinion, the penis does not require an erection. According to Abdul Halim Hasan, adultery means that a man inserts his genitals into a woman's genitals, with no marriage and no sexual intercourse. This definition is almost similar to that put forward by Abdul Djamali, namely adultery is the act of inserting a male's genitals up to his neck into the desired female's genitals. According to Abdul Halim Hasan, adultery means that a man inserts his genitals into a woman's genitals, with no marriage and no subhat occurs. This definition is almost similar to that put forward by Abdul Djamali, namely adultery is the act of inserting a man's genitals up to his neck into the desired female genitalia. Meanwhile, according to fiqh scholars, the meaning of adultery is inserting the penis into an unlawful vagina without subhat. And according to Ibn Rushd, the notion of adultery is intercourse that is not done because of a valid marriage/semi-marriage and not because of the ownership of a slave. Meanwhile, according to Hamka, adultery is all intercourse outside of marriage, and in another Juzu' he defines adultery as all intercourse that is not legalized by marriage, or which is not legal. The Encyclopedia of Islamic Criminal Law mentions the definition of adultery according to several schools of thought,

which, although the editorial differs, actually means the same thing, namely intercourse between a man and a woman carried out by amukallaf who is not bound by a valid marriage. Adultery is a crime that is punishable by *ḥudūd* or *ḥād*, namely a punishment imposed on violations involving the rights of Allah the punishment for adultery has been regulated by the Qur'an because it is the right of Allah SWT. Absolutely (Djamal, 2019).

## 2. Adultery in the Perspective of the Criminal Code

Article 284 of the Criminal Code does not clearly define the meaning of adultery, but tends to explain the criteria for perpetrators who can be charged with adultery. His wife or husband. Meanwhile, what is meant by intercourse is a combination of male and female genitalia which is usually carried out to get children, so the male member enters the female member, thus releasing semen. This definition is relatively the same as the term adultery in English which is defined as "Voluntary sexual intercourse by a married person with one who is not his or her spouse". If translated into Indonesian, it means "voluntary sexual relations by someone who is bound by marriage to someone who is not their husband or wife". There are several criteria for adultery according to the Criminal Code, namely: first, sexual intercourse with a woman who is not a wife or a man who is not a husband. Zina is committed jointly, cannot be committed by one person or two persons of the same sex, meaning that it cannot be committed between a man and a man or a woman and a woman. Thus, adultery is intercourse committed by a man or woman who is legally married to a woman or man who is not his wife or husband. So that only perpetrators who are legally married can be charged with Article 284 of the Criminal Code. If one of the perpetrators of adultery is not currently legally married, he cannot be sentenced to commit adultery, but is sentenced to have participated in committing adultery and be burdened with the same responsibilities as the adulterer himself. People who participate in committing adultery do not have to be married. He also does not have to submit to article 27 BW. While he knows that his adulterous friend is subject to article 27 BW. In other words, if one of the perpetrators of adultery is married, then even though his adulterous friend is not currently married, he can also be charged with adultery, although not as the perpetrator of the crime of adultery, but as the perpetrator of participating in committing adultery, but is subject to punishment. Who are like perpetrators of adultery. If the two perpetrators of adultery are not legally married, then the Criminal Code cannot prosecute them because in Article 284 paragraph (1) it is stated that what can be charged with adultery is what is committed by a married man or a married woman. In this context what applies is article 27 of the Indonesian Civil Code (BW) which stipulates that a man can only be married to one woman, and a woman only to one man. In this case it seems clear that the Criminal Code is heavily influenced by European traditions, particularly the Netherlands. There, both a man and a woman who are married commit the crime of adultery when they have intercourse with a third person. Furthermore, article 284 of the Indonesian Criminal Code is an absolute complaint offense. This means that one cannot be prosecuted if there is no complaint from the husband or wife who is aggrieved (which is humiliated). Complaints cannot be made by anyone other

than the husband or wife of the adulteress. In the case of adultery, complaints cannot be filed against the participant alone. But let the two perpetrators be reported. Bearing in mind that the crime of adultery is a crime for which two people are required to materialize, it is called absolute participation, which cannot be separated from one another, even if the complainant complains about only one person between the two people who have committed adultery, it does not cause the prosecution not to be carried out against the person who is not complained about by the complainant. The public prosecutor can prosecute people who have not been complained about based on the principle of opportunity. Complaints can be interpreted as objections in the sense of "disapproval". If it is considered that there is "agreement" then it does not meet the requirements to be prosecuted. So if adultery occurs while the wife or husband of the perpetrator agrees to the act of adultery committed by their partner, then this problem cannot be said to be adultery. This is because the perpetrator's husband or wife has agreed. However, in the case of this kind of abuser, articles 72, 73 and 75 do not apply. Article 72 regarding minor complainants who are not yet sixteen years of age or under amnesty. Article 73 concerning victims who have the right to complain have died. And article 75 regarding the right to withdraw complaints within three months. In the case of adultery, the complaint can be withdrawn, as long as the incident has not yet been examined in court. In practice, before the trial hearing begins, the judge still asks the complainant whether he remains true to his complaint, if so, then the examination will begin (Simon Purba, Mustamam, 2021).

In the draft law (RUU) of the Criminal Code, new sanctions for adultery have been formulated. Namely, in article 484 it is stated that the penalty for committing adultery is five years in prison. And punishable by a maximum of two years in prison for perpetrators of cohabiting, namely the act of living at home without any marriage ties. Even though it has not been legally enacted, at least there is a plan to change adultery sanctions. And it seems that the criteria for adultery have been expanded. The proof is in the Criminal Code Bill that the definition of cohabitation has been mentioned, namely the act of living at home without any marriage ties. However, only those who commit acts of living at home are subject to punishment, while intercourse committed by those who are unmarried and do not live at home cannot be prosecuted by law.

3. Similarities and differences between Islamic law and the Criminal Code.

Islamic law provides an explanation that adultery is intercourse that is carried out outside of a legal marriage. This is different from the formulation of the Criminal Code, which states that adultery only applies if the two perpetrators are legally married. So only perpetrators who are bound in a valid marriage can be charged under the adultery article. In terms of the criteria for the crime of adultery, there are several things that are used as a benchmark in determining the crime of adultery, which of course in each of these criteria there are similarities as well as differences between Islamic law and the Criminal Code. The criteria for the crime of adultery include: first, intentional intercourse outside of marriage. Islam has emphatically stated that any sexual intercourse outside of a valid marriage bond is adultery. The Criminal Code also argues that all intercourse that occurs outside of a legal marriage and is carried out on purpose is an act of adultery. However, in contrast to Islamic law, in the Criminal Code, only perpetrators who are legally married can be charged with adultery.

Second, the perpetrators of adultery who can be sanctioned according to Islamic law are *mulattoes*. Islamic law does not differentiate in terms of the status of the adulterer whether he is married or unmarried and whether he is in a legal marriage or not. However, in imposing sanctions, Islamic law distinguishes the perpetrators of adultery into two categories, namely *muḥṣan* and *ghair muḥṣan*. A *muḥṣan* adulterer is a married adulteress regardless of whether or not he was in a legal marriage bond at the time of committing adultery, in the sense of whether he is still a husband or wife or a widower or widower, as long as he has had a legal marriage, then he is categorized as *muḥṣan* adulterer. Meanwhile, the adulterer *ghair muḥṣan* is an adulteress who has never been married. In the Criminal Code, the terms adultery *muḥṣan* or *ghair muḥṣan* are not known. The Criminal Code also requires the offender to comply with Article 27 BW because Article 27 BW adheres to the principle of monogamy, where a man is only allowed to marry only one woman, and vice versa, a woman is only allowed to marry one man. So for the perpetrators of adultery who are not subject to article 27 BW, they cannot be categorized as perpetrators of adultery or perpetrators participating in committing adultery because they are considered to adhere to the principle of polygamy. Even though the Criminal Code requires that only perpetrators who are in a legal marriage bond and who are subject to Article 27 BW can be prosecuted by law. Third, it is not done out of necessity. Islamic law and the Criminal Code agree that the crime of adultery is sexual intercourse between two people who like each other. That is, the intercourse is carried out on the basis of the consent of both. So that when one of them does not want the intercourse, the intercourse is no longer referred to as a criminal act of adultery but is included in the category of a criminal act of rape. In the case of rape, legal sanctions only apply to the perpetrators of the rape, while the rape victim cannot be charged with rape because the victim does not want sexual intercourse and she is in a disadvantaged position. Fourth, the financing process. In Islamic law, adultery is included in *jarimah ḥudūd* which is the right of Allah SWT absolutely. So that the sentencing process requires caution and strong evidence is needed to



decide the adultery problem. There are at least three pieces of evidence to prove that adultery has occurred, namely: witness, confession, and qarīnah. From some of the evidence, it can be seen that adultery in Islamic law can be criminalized when at least one of the pieces of evidence is available. So that there is no need for complaints from the aggrieved party, as long as there is evidence that adultery has occurred, the law applies to the perpetrator. Islamic law also does not limit only the aggrieved husband or wife who can report it, but anyone who knows that adultery has occurred as long as all evidence is fulfilled. This is different from The Criminal Code states that adultery is an absolute complaint offense so that when there is no complaint from the aggrieved party, namely the husband or wife of the perpetrator, the perpetrator cannot be charged with adultery. In addition, the Criminal Code gives permission to the complainant to retract his claim as long as the incident has not yet begun to be examined in court, even though in fact before it starts, the judge still asks the procurer whether he remains in his complaint, if so, then the examination will begin. This is different from Islamic law, which states that when it is known that adultery has occurred, the punishment cannot be canceled. Because the criminal act of adultery enters the jarimah ḥudūd which is the absolute right of Allah SWT and the punishment has been prescribed in the Koran (Sanksi & Pidana, 2022).

Fifth, sanctions for adultery. If Islamic law provides for flogging or stoning, the Criminal Code only threatens him with a maximum imprisonment of nine months. This difference is clear because the basis of the two laws is different. Islamic law rests on the Koran and Hadith, while the Criminal Code only comes from the results of human thought. Moreover, the Criminal Code is a product of western ideas. Sixth, the purpose of the prohibition of adultery. The purpose of the prohibition of adultery by Islamic law is to preserve and develop offspring; maintaining household harmony, upholding dignity and self-respect from things that are disgraceful and tainted; preventing diseases and deadly viruses from occurring. Whereas the Criminal Code considers that the crime of adultery is a form of denial or betrayal of marriage. So from this it can be seen that the purpose of prohibiting adultery by the Criminal Code is to maintain household harmony. The Criminal Code does not pay attention to other possibilities that arise as a result of adultery. Like the transmission of deadly diseases and viruses due to unhealthy intercourse. Sexual diseases, such as the HIV/AIDS virus, gonorrhoea or syphilis, are a type of disease that is worrying. The disease is transmitted through sexual contact (Rahmatillah & Nurlina, 2018).

## **CONCLUSIONS AND RECOMMENDATIONS**

Islamic law distinguishes adultery into two types, namely muḥṣan adultery and ghairu muḥṣan adultery. Muḥṣan adultery is adultery committed by married offenders, the penalty is stoning. And ghairu muḥṣan adultery is adultery committed by unmarried offenders, the sanction is one hundred lashes or jild and exile for one year. Meanwhile, according to the Criminal Code, adultery only ensnares perpetrators who are legally married, subject to article 27 BW, there are complaints from the aggrieved party (in this case the perpetrator's husband or wife) and the sanction is a maximum imprisonment of nine months. Between Islamic law and the Criminal Code, there are similarities as well as differences in responding to the problem of adultery, including the problem of the criteria for adultery, including sexual intercourse outside of marriage that is legal and carried out on purpose. Islamic law and the Criminal Code emphasize that adultery is sexual intercourse outside of a legal marriage. The difference is, if Islamic law does not look at the status of the adulteress, then the Criminal Code only ensnares the perpetrators who are bound in legal marriages. Then there is the matter of the perpetrators of adultery, Islamic law stipulates that every mulatto can be subject to hadith sanctions by dividing the perpetrators of adultery into two, adultery ghairu muḥṣan and adultery muḥṣan, so that anyone can be punished with had except for small children, people lacking in sense and idiots because they are not included in the kamullaf.

Whereas the Criminal Code only ensnares perpetrators who are bound in legal marriages and are subject to Article 27 BW only. Furthermore, it is not done because it is forced, in this case Islamic law and the Criminal Code agree that adultery does not apply to people who are forced. Because adultery is done on the basis of consensual. For the sentencing process, in Islamic law every adultery can be criminalized when there is sufficient evidence indicating that adultery has occurred, the evidence is the presence of four witnesses, the confession of the perpetrator and there is a qarīnah. In contrast to the Criminal Code which places adultery in an absolute complaint offense, so that only the husband or wife of the perpetrator can report the adultery. Finally, in terms of imposing sanctions, Islamic law provides for stoning and flogging for adultery perpetrators, while the Criminal Code only provides for imprisonment for a maximum of nine months. So that the impact that arises as a result of the difference between the two laws, is the increasingly widespread promiscuity and prostitution because it turns out that the Criminal Code cannot ensnare all perpetrators of adultery because they do not fulfill the criteria presented by article 284 of the Criminal Code. The author believes and believes that this research still needs improvement in terms of content and methodology, therefore the author needs constructive criticism and suggestions from readers in order to produce subsequent research that is much better than the current one so that the science of Islamic law continues to develop from mass to mass and can benefit society.

### **Advanced Research**

As an academic, the author requests other prospective writers to always develop human resources in order to develop the country by continuing to provide the best works for the nation and state with articles in the discipline of Islamic law.

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