

Adultery in the Perspective of Islamic Law and the Criminal Law Legislation a Comparative Study

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Abstract: The purpose of this research is to know and analyze the provision of adultery crime according to Islamic Law and Podana Law Kitana and to know and analyze the sanction that threatened to perpetrator of adultery crime according to Islamic Law and Criminal Code. This research relies on the normative approach, ie research on legal principles. Synchronization of law, comparative law and legal history. The results indicate that criminal punishment for adultery in Indonesian positive law embraces the Dutch legal system, but the Indonesian people have their own perspective on adultery. Zina is regarded as a cruel act and anyone who has sex outside the legal marriage, although the perpetrators are single, then it is considered adultery

Keyword: Adultery, Perspective Of Islamic, Criminal Law

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I. INTRODUCTION

Indonesia is a constitutional state, where it has been mentioned twice in the 1945 Constitution, ie before the amendment which states that "Indonesia is a state based on the rule of law" and after the amendment which reads "the State of Indonesia is a rule of law". This is contained in the 1945 Constitution article 1 paragraph (3). Although there are differences in the 1945 Constitution before and after the amendment, in essence both have the same goal, namely to make the State of Indonesia a rule of law.¹

As a rule of law, a state must have a legal system, but unlike other countries, there are three legal systems in place in Indonesia. There is a common law which is the successor of the local rules of society and cultures that exist in the archipelago, Islamic law (Islamic law) which is the sharia law that dominates in society because the majority of people embrace Islam, and the law Europe (Civil Law) which is a relic of the Dutch colony that now prevails as a positive law in Indonesia.

Due to the variety of applicable legal system, it is undeniable that there are several advantages and disadvantages perceived in the implementation of law in Indonesia. The advantage is that law enforcers have the option of deciding a case and not necessarily decide according to existing black-and-white rules, but can consider the values that exist in the community so that the people are satisfied with justice with dignity. The weakness is, sometimes law enforcers feel confused in deciding a case because the legal culture of a community in a different region, so that not infrequently the collision of perception between the community and law enforcement which then produces a sense of injustice in the public eye glass.

It is very visible in relation to the problem of adultery. Adultery law in Indonesia has its own polemic from the provisions to the implementation of sanctions. How not, the law regulating the adultery in the Criminal Code (KUHP) is considered irrelevant to be applied in Indonesian society, especially the adultery in Indonesia is considered an act that is very inappropriate and contrary to the moral and norm in a cultured society. Then the question arises how exactly the provision of adultery crime in the Criminal Code (Criminal Code) so many people do not agree with it?

The arrangement of adultery and sanctions is very clear that article 284 of the Criminal Code only regulates the affair issue, which in which the article only applies if one of the perpetrators or both is still bound by a legal marriage with another person. Then in paragraph (2) explains that this article is a complaint offense,

¹La Ode Husen, 2017, *Accountability and Oversight in the Structure State System in Indonesia*, International Journal of Science and Research (IJSR) Volume 6 Issue 6, June 2017, p. 2018,

which can only be prosecuted if the legal spouse commits a complaint. As for the case of intercourse outside the context of this article, it will apply the legality principle, as in the case of one of the celebrities in Indonesia in 2010, where the perpetrator is only charged under Article 4 of the Law on Pornography, Article 27 of the Information Technology Law and Article 282 of the Criminal Code. This happens because of the action video of the perpetrators spread in cyberspace, so if the video does not exist, then the perpetrator is not entangled in any article, because article 284 of the Criminal Code does not apply to him.

That provision raises the problem in society. The public view of adultery is much more complex than that set out in the National law. Adultery is not merely an affair, but it is more moral and morally and should be prevented early on, and not only after marriage. This perspective arises in society because of the influence of religious norms and the firm hold of the people against the values of Pancasila, where the first precepts mention "Belief in the One Supreme" so that the law that obeys God is better than any other law. Thus the definition of adultery embedded in the values of society is inclined to the nature of adultery in religion, which considers adultery as a vile act, as contained in Al-Quran Surah Al-Isra 'verse 32, Allah SWT says "'And do not go near adultery; indeed, adultery is a cruel act. And a bad road".

The nature of religious norms sees adultery not just a copulation but every act that invites lust against non-mahram is also called adultery. This can be seen also in the words of Prophet Rasulullah SAW in the hadith of Muslim history, "'Set upon the descendants of Adam his part of zina will be obtained it is not impossible. The two eyes of his zina are looking (the haram). The second ear of his zina is listening (the haram). His oral adultery is to speak (the haram). Her zina hand is holding (the haram). Her zina leg is stepping (to the forbidden). While the heart is willing and wishful, the genitals that justify it or deny it".

II. PROBLEM IDENTIFICATION

Based on the above introduction can be identified as follows: What is the provision of adultery according to Islamic law and Criminal Code? and What are the sanctions for the adulterers of adultery according to Islamic law and the Criminal Code?

III. THEORETICAL FRAMEWORK

Theory in the world of law is very important existence, because theory is a concept that will answer a problem. The theory according to experts is considered as a means that gives a summary of how to understand a problem in every field of law science.

According to Sarlito Wirawan Sarwono, Theory is a series of hypotheses or interconnected propositions about a phenomenon (phenomenon) or a number of symptoms.² The theory of punishment, which in English is called the theory of punishment, whereas in Dutch, it is called the *theorie van de straf* is closely related to the imposition of a criminal to a perpetrator in violation of applicable legislation.

Criminalization is the punishment of a perpetrator who has committed a crime. Criminal acts are, "The act by which a rule of law is prohibited and punishable by criminal, provided that it is remembered that the prohibition is directed to an act, that is a circumstance or event caused by the behavior of a person, while the threat of punishment is addressed to the person who caused the incident.

Experts differ in their views on the classification of the theory of punishment. Some divide it into two theories and some divide it into three theories of punishment. Experts who examine this type of penal theory are, like, Algra, L.J. van Apeldoorn, and Muladi. However, when combined these three views of experts, the theory of punishment can be classified into four theories, which include:

- 1) absolute theories;
- 2) relative theory (*doeltheorie*);
- 3) the theory of unity (*vereenegingstheorie*); and
- 4) teleological retributive theory.

Algra expressed his view of absolute theory. Absolute theory holds that, "The state shall punish the perpetrators because the person has sinned (*quia peccatum*).³ L.J. van Apeldoorn expressed his view of absolute theory. The absolute theory is: "The theory that justifies the existence of punishment is solely based on the offense committed. Only the '*quia peccatum*' sentence is imposed because it is the person who makes the crime. The purpose of punishment lies in the punishment itself. Punishment is the absolute consequence of something offense, a reprisal of a crime perpetrated by the offender.⁴

² Sarlito Wirawan Sarwono, 2003, *Teori-Teori Psikologi Sosial (Theories of Social Psychology)*, Jakarta: Raja Grafindo Persada, p. 5

³ N.E. Algra, dkk., 1983, *Mula Hukum*, Jakarta: Binacipta, p. 304

⁴ L.J. van Apeldoorn, 1985, *Pengantar Ilmu Hukum*, Jakarta: Pradnya Paramita, p. 343

IV. DISCUSSION

The matter of adultery is governed in the offense of adultery in article 284 of the Criminal Code, Chapter XIV of Crime Against Decency which reads as follows:

Threatened with maximum imprisonment Nine months:

- a. A married man who does an overspel, when it is known that Article 27 BW applies to him;
- b. A married woman who does the will, knowing that Article 27 of the Civil Code applies to her;
- c. A man who participated in the act, when he knew that the guilty had married; b. A married woman who participated in the act, when it was known to her that the guilty person had married and Article 27 of the Civil Code applies to her.

1) No prosecution but complaints of spouse and spouse, and if applicable to Article 27 BW, within a period of three months followed by divorce or split-table and bed requests for that reason.

2) This complaint shall not apply to articles 72, 73, and 75;

3) Complaints may be withdrawn while the court hearing has not yet begun;

4) If the spouses apply Article 27 BW, the complaint is ignored as long as the marriage has not been decided because the divorce or before the verdict which declares the separate table and bed become permanent.

The nature of adultery in the Qur'an is explained in much greater detail in the Bible of Matthew 5, verses 27-28 which read: "You heard that it has been said, 'Do not commit adultery'." "But I tell you that anyone who continues to look upon a woman so as to have lust for her has committed adultery with her in her heart".

The criminal act of adultery or overspel referred to in Article 284 of the Criminal Code is an opylated delict or a crime that must be committed intentionally. This means that the element of deliberate must be proven to exist in the perpetrator, so that he may be proven to have fulfilled the element of intent in committing one of the adultery of adultery of the criminal act of adultery as regulated in Article 284 of the Criminal Code. Of acts which, if done, can be viewed as an adultery, the law does not provide an explanation, as if what is meant by adultery is obvious to everyone.

The word "adultery" in Article 284 of the Criminal Code has another definition of adultery in Islamic law, so it can be understood that the National Legal Development Board of the Department of Justice of the Republic of Indonesia has sought to find a more appropriate word for overspel in Article 284 paragraph 1 of the Criminal Code, which usually have been translated people with the word *gendak*

The sanctions or punishments stipulated in the religious provisions are also very different from those set out in positive law. There is a classification of certain penalties, such as the punishment for married offenders who are married in contrast to the punishment for perpetrators who are still single.

This can be seen in the hadith narrated by Abu Dawud no. 4438, which reads, "From Jabir (bin 'Abdullah), that there is an adulterous man with a woman, then by the Prophet SAW commanded to the man to be scourged as a punishment. But then he was told that the man was muhsan (already married), then ordered to be stoned, then he was stoned.

Thus there is a marked contrast between the two legal systems, especially regarding the definition of adultery and the execution of punishment. To support the statement of disagreements, the authors conducted a pre-research survey to 33 (thirty-three) people by asking the questionnaire. The result is about 87.9% assume that adultery is not limited to marriage-bound offenders, 97% stated that adultery in Indonesia is increasing, 66.7% believe that adulterer is a form of moral damage of Indonesian people, and 69.7% % want the implementation of Islamic law for adultery in order to prevent moral degradation.

It is very reasonable to see the results of the percentage of public opinion, given that the many news in the media related to adultery issues that often make people restless, especially parents. Unwanted events such as pregnant out of wedlock, abortion, baby dumping, and even the murder of many pregnant women adorn the Indonesian glass screen. As a result of these events, some community leaders and even the community itself assumes that the zina article in positive law is not effective to be applied in Indonesia. It is questionable whether the provisions of the Criminal Code concerning adultery are really ineffective and whether Islamic law is capable of overcoming the problem of adultery in Indonesia? So depart from the description, the author tries to examine much more deeply about the problem of adultery through comparison of Islamic law and positive law.

Based on the Theory of the Creed or the Legal Authority presented by H.A.R. The Gibb states that a Muslim who has accepted Islam as his religion means he has accepted Islamic legal authority over him. This theory requires the enforcement of Islamic law by those who have uttered two sentences of the creed as a logical consequence of the pronouncement of his credo. This theory is formulated from the Qur'an. The verses of the Qur'an referred to are among others: Al-Qur'an sura 1st verse 5; 2nd chapter of verse 179; 3rd chapter of verse 7; 4th chapter of verses 13, 14, 49, 59, 63, 69, and 105; 5th chapter of verses 44, 45, 47, 48, 49, 50; the 24th chapter of verses 51 and 52.

The theory of this credo is actually a continuation of the principle of Tawheed in the philosophy of Islamic law. The Principle of Tawheed requires everyone who claims to have faith in God's Supreme Being,

then he must submit to what Allah has commanded. In this case obedient to Allah's command in the Qur'an as the verses mentioned above, and at the same time obedient to the Prophet and his Sunnah.

In the perspective of criminal law, adultery is included in criminal acts of decency so that it is closely related to the norm. The morality norms are the rules of conduct in the relationships among fellow human beings who are in many ways based on the "conscience" of both good and evil behavior. Decency in the broad sense, not only about the question of mercy or sex alone, but includes all appropriate and reasonable life habits in a community group (certain) in accordance with the characteristics of the community concerned. The moral norm is not only limited to people who embrace a particular religion, but also to those who do not recognize a religion.

People are compelled to obey moral norms, because their desire to live in society is not solely because of spiritual or corporal coercion. Moral norms in society not only regulate human behavior, but there are sanctions for violation. In the Criminal Code, acts which are classified as violating the norm of decency are referred to as crimes against decency or moral decency. Delik susila according to Big Indonesian Dictionary means a criminal offense in the form of violation of morals. Violation of morals in the sense here is an act that violates morality which types and forms of violation also sanctions have been regulated in the Criminal Code.

The criminal provisions set forth in the Criminal Code have been deliberately established by lawmakers with a view to providing protection to persons who are deemed necessary to obtain protection against immoral acts or ontuchte handling and against good behaviors in the form of words words or in deeds that offend moral sense as opposed to people's views of propriety in the area of sexual life, whether in terms of the views of the local community where the words have been spoken or where the deeds have been committed, or reviewed in terms of local customs in running their sexual lives.

Crime against decency even though the amount is relatively small compared to the crime against property (wealth) but from the past until now often cause concern, especially the parents. The morality deed according to D. Simons a married person who commits adultery with a married person, can not be punished as a participant in the adultery committed by the last person. The moral declaration is set forth in Chapter XIV Book II of the Criminal Code entitled "crimes against decency" beginning with article 281 of the Criminal Code up to Article 297 of the Criminal Code.

Islamic criminal law is a translation of fiqh jinayah which is one of the six branches of fiqh science in Islamic law. The six branches of fiqh are fiqh of worship, muamalah, munakahat, jinayah, siyasah, and mawaris. Islamic criminal law that is translated from the term fiqh jinayah, if defined in full includes two main words, namely fiqh and jinayah. Etymologically, fiqh comes from the word faqiha-yafqahu which means to understand speech well.⁵ The term jinayah which is also derived from Arabic, comes from the word jana-yajni-janyan-jinayatan which means adznaba (sinning) or tanawala (reaching or plucking and collecting) as in the phrase jana al-dzhaba (one collects gold from mining) . In explaining the meaning of the word jinayah, Louis Ma'luf said that the word jana means irtakaba dzanban (sin). The culprit is called the fetus and the plural is junatin⁶.

V. CONCLUSION

1. Generally Islamic jurists limit the scope of jinayah meaning only to acts that threaten the lives and physical sustenance of humans, namely acts of murder, injury, beating, and abortion; although some scholars argue that the term jinayah includes all the hudud and qisas criminal acts. It can be concluded that jinayah is an action or deed of someone who threaten human physical safety and potentially cause harm to human dignity and property so that action or deed is considered unlawful to be done, even the perpetrators must be subject to legal sanction in the world and in the afterlife as punishment of God.
2. The most influential factor in the application of adultery law is the substantial injection of the normative aspects of Islamic teachings in Indonesia gave rise to an epistemological attitude that has a major contribution to the growth of life view, moral ideals, and legal ideals in the socio-cultural life of society. The process thus goes hand in hand with the level of religious understanding, thus reflecting the correlation between Islamic teachings with social reality and the phenomenon of Islam, how to have a substantial role in the arena of the birth of the fundamental norm of the State.
3. Islamic criminal law should be applied, though unpopular, in order to achieve the benefit for individuals and society. Thus, jinayah fiqh is intended to prevent a person from committing a crime because the penalty is to prevent before the occurrence of the action (preventif) and venting after the occurrence of deed (repressive)

⁵ Ibrahim Anis, Abdul Halim Muntashir, dkk., 1972, *Al-Mu'jam Al-Wasith*, Mesir: Dar Al-Ma'arif, p. 698

⁶ Louis Ma'luf, 1973, *Al-Munjid fi Al-Lughah*, Cet. 17, Damaskus: Dar Al-Fikr, p. 105

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