

ADULTERY LEGAL REVIEW IN ISLAMIC CRIMINAL LAW AND INDONESIAN CRIMINAL LAW

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ABSTRACT

Adultery provisions in legislation in Indonesia have not been very effective in overcoming adultery problems in Indonesia. A shift in moral values in certain communities has also taken place, which can be seen from the behavior of some adulterers who are increasingly brave and do not reflect guilt. In this country of Indonesia, all of its people are the God of the Almighty and the majority are Moslems in which the religion of Islam is a very strict and strict religion prohibiting the act of adultery. Adultery carried out by adults, both like, both voluntarily, knowingly and consciously does not include criminal acts according to Article 284 in the Criminal Code (KUHP). This is very different from the law of adultery in Islamic criminal law. This study discusses the form and criminal sanctions on adultery offenses in Islamic criminal law and positive Indonesian criminal law.

Keyword : Adultery, legislation in Indonesia, criminal sanctions

A. Introduction

Adultery provisions in the laws and regulations in Indonesia have not been very effective in overcoming adultery problems in Indonesia. A shift in moral values in certain communities has also taken place, which can be seen from the behavior of some adulterers who are increasingly brave and do not reflect guilt. In Indonesia, all of its people are God Almighty and the majority is Muslim, in which Islam is a very strict religion prohibiting adultery. Even more alarming, the act of adultery carried out by adults, both like, both voluntary, deliberately and consciously do it does not include criminal acts according to Article 284 of the Criminal Code (KUHP).

The regulation of adultery which is regulated in Article 284 of the Criminal Code is very different from Criminal Law in Islamic Law which distinguishes punishment or criminal sanctions (the adulterers). It can be seen from the provisions of God which determines the form of criminal acts, the punishment and verification is a provision that is qath'i and zanni. God as al-Khaliq, the Creator of the universe, among other people, is the Knower of human

nature or character as His creatures. Likewise in terms of sexual desire between men and women. Therefore, Allah has determined the legal provisions which deal with adultery, as a sign of Allah's love for His servants, so that every human being remains pure and maintains himself from cruel acts, including adultery.¹

In order to avoid the widespread problems that will be discussed, the researcher limited the scope of the problem into the form contained in the formulation of the problem and the purpose of the study at this writing. The formulations of the problems are as follows:

1. How is the Legal Review of the Criminal Acts of Adultery and the Forms of Sanctions in Islamic Criminal Law?
2. How is the Legal Review of the Criminal Act of Adultery and Its Sanction According to the Indonesian Criminal Law Regulations?

B. Research Methods

Research methods are a way or way to regain solutions to all problems. In connection with this, the authors describe the research methods used are as follows:

1. Approach Method

The type of approach used in this study is normative juridical approach with comparison method. Comparison is one of the methods used in normative juridical research to compare one legal system with another. In this case is the legal system in Islamic Criminal Law concerning adultery with the Indonesian Criminal Law system concerning adultery.

2. Research Specifications

The research specification used in this study was prescriptive, which is a science that studies the purpose of law, the values of justice. The validity used the rule of law, legal concepts and legal norms.

C. Research Results and Discussion

1. Legal Review of Criminal Acts of Adultery and Its Sanction Forms in Islamic Criminal Law

As for this writing the author found 2 (two) forms of adultery, namely: Zina Muhshan and Zina Ghairu Muhshan. The following is an explanation of both including the legal sanctions:

¹Sri Endah Wahyuningsih, 2013, *Prinsip-Prinsip Individualisasi Pidana Dalam Hukum Pidana Islam dan Pembaharuan Hukum Pidana Indonesia*, Badan Penerbit Universitas Diponegoro, Semarang, page.6-7

a. Zina Muhshan (Muhshan Adultery)

It is adultery whose perpetrators are husband, wife, widower or widow. This means that the perpetrator is a person who is still married or has been legally married. Sanctions for Muhshan adulterers are stoning (*rajam*), ie the perpetrator is stoned to death. The stoning penalty for Muhshan's adulterers was not explicitly mentioned in the Qur'an, but its existence was determined through the words and deeds of the Prophet. In addition, this is also recognized by *ijma shabat* and *tabi'in*.²

Meanwhile, the hadith which mentions the existence of stoning punishment is stated explicitly by Umar Bin Al-Khathab, as follows: "Abdullah bin Abbas said that Umar Bin Al-Khatab sat on the pulpit of the Messenger while giving a speech," truly Allah sent Muhammad to bring the truth and Allah revealed the Qur'an to him. Among the revealed verses there is a stoning verse. We read it, studied it, and understood it. Furthermore, the Messenger of Allah carried out the stoning penalty and we also carried out the stoning penalty after his time passed. Umar said, I was afraid that if a long time had passed there were people who said "we did not find stoning in the Kitabullah". Therefore, they abandon the obligation that Allah has sent down, whereas in fact the stoning penalty is true in the Book of Allah which is imposed on those who commit adultery if they have married or married to each man and woman and if there is strong evidence, pregnancy occurs, or on the basis of recognition. "(HR Muslim).³

Ibn Rushd said that there was a group of people who refused this stoning sentence. He mentioned as *firqah min ahl al-ahwa* (group of lust followers)⁴. According to them, the punishment for perpetrators of zina/adultery, whatever the type is whipped⁵. In addition there are still other groups that reject stoning. Ash-Shabuni said that the group was the Khawarij. They believe that stoning is not an Islamic law. Here are their arguments:⁶

- 1) The stoning penalty is too sadistic. If it is indeed required by Islam, it must be mentioned in the Qur'an. Meanwhile, everyone knows that there is no single verse in the Qur'an about stoning.

² Muhammad Ali Ash-Shabuni, *Rawa'i Al-Bayaan fi Tafsir Ayat Al-Ahkam min Al-Qur'an*, Dar Al-Fikr, Beirut, jilid II, page.21

³ M. Nurul Irfan, 2014, *Gratifikasi dan Kriminalitas Seksual Dalam Hukum Pidana Islam*, Amzah, Jakarta, page. 61-63

⁴ *Ibid*, page.23

⁵ Ibnu Rusydi, *Bidayah Al-Mujtahid wa Nihayah Al-Muqtashid*, Toha Putera, Semarang, jilid II, page.325

⁶ Muhammad Ali Ash-Shabuni, *Op.,cit*, page.21-22

- 2) Regarding the adultery committed by the servant of Sayaha, the punishment is half of the punishment of free people. If this is divided by two with the number of hundred lashes, there is no problem. However, if the sentence is stoned to death, it cannot be divided into two. There can't be a death sentence. Therefore, this type of punishment is not legally enforced for free people.
- 3) The type of punishment for adultery is general for various kinds of adultery, so that the specialization of punishment for adultery muhsan from the general law above means to violate the Qur'an.

The three arguments of the Khawarij above are refuted by Ahlusunah with the following description:

There is no mention of stoning in the Al-Qur'an does not mean that it is not stated. Many Shari'a laws are not mentioned in the Qur'an, but are clearly described in the hadith. Besides that, Allah told us to always follow the Messenger of Allah and carry out all His commands. In that connection God says as follows:

لَا كَيْ السَّبِيلِ وَالْبَنِ وَالْمَسَاكِينِ وَالْيَتَامَى الْقُرْبَىٰ وَلِذِي وَلِلرَّسُولِ فَلِلَّهِ الْقُرَىٰ أَهْلٍ مِنْ رَسُولِهِ عَلَىٰ اللَّهِ أَقَاءَ مَا شَدِيدُ اللَّهِ إِنَّ اللَّهَ وَاتَّقُوا ۖ فَانْتَهُوا عَنْهُ نَهَاكُمْ وَمَا فَخَذُوهُ الرَّسُولُ أَتَاكُمْ وَمَا ۖ نَكُمْ مِنَ الْأَغْنِيَاءِ بَيْنَ دَوْلَةٍ يَكُونُ الْعِقَابِ

Meaning:

"You. what the Apostle gave you, then accept. leave what he forbids. and fear Allah. Verily Allah is harsh in punishment. "(Surat al-Hashr: 7)

We also believe that everything that is done by the Prophet is based on Allah's revelation as mentioned in the following verse:

(٣) الْهَوَىٰ عَنِ يَنْطِقُ وَمَا
(٤) يُوحَىٰ وَحَىٰ إِلَّا هُوَ إِنَّ

Meaning:

"And that is what he said (Al-Quran) according to his lustful will. His words are nothing but revelations revealed (to him). "(Surat an-Najm: 3-4)

Thus, how can they argue that stoning is not sanctioned by Islam,⁷ even though the Messenger of Allah and his companions had done it.⁸

⁷ M. Nurul Irfan, *Op.cit.*, page.25

⁸ *Ibid*, page.65-67

Furthermore, As-Sayis argues that the Al-Qur'an abstinence with Ahad's hadith is very likely to be allowed because the Al-Qur'an verse although it is mature is qath'i, and may be zhanni. Meanwhile, regarding the punishment of stoning, the hadith which explains it is mutawatir or at least worries about meaning. Thus how could the khawarij group not recognize it⁹. From the above explanation, it can be concluded that the stoning penalty for the adulterers of Muhshan, although not mentioned in the Qur'an, the provisions are determined by the hadith, the agreement of friends, as well as the consensus of any school of scholars.¹⁰

b. Zina Ghairu Muhshan (Ghairu Muhshan Adultery)

It is the adultery that the culprit is still a virgin. It means, the perpetrator has never been legally married and is not in a marriage bond¹¹. As for the adulterer of Ghairu Muhshan, the punishment is a caning sentence a hundred times. In contrast to the stoning penalty on muhshan adultery, the caning penalty for adulterers of ghairu muhsan is explicitly confirmed in the Qur'an. This provision is based on the word of God as follows:

بِاللَّهِ تُؤْمِنُونَ كُنْتُمْ إِنْ اللَّهَ دِينَ فِي رَأْفَةٍ بِهِمَا تَأْخُذُكُمْ ۖ وَلَا جَلْدَ مِائَةٍ مِنْهُمَا وَاحِدٍ كُلٌّ فَاجِلِدُوا وَالزَّانِي الزَّانِيَةُ
 الْمُؤْمِنِينَ مِنْ طَائِفَةٍ عَذَابُهُمَا ۖ وَلَيْسَ لَهُ الْآخِرَ وَالْيَوْمِ
 الْمُؤْمِنِينَ عَلَى ذَلِكَ ۖ وَحَرَّمَ مُشْرِكٌ أَوْ زَانٍ إِلَّا يَنْكِحَهَا لَا وَالزَّانِيَةَ شَرِكَةً أَوْ زَانِيَةً إِلَّا يَنْكِحُ لَا الزَّانِي

Meaning:

"2. Women who commit adultery and men who commit adultery, Then each one of them is one hundred times blasphemous, and let no mercy on them prevent you from (practicing) Allah's religion, if you believe in Allah, and the Hereafter, and let it (execution) their punishment is witnessed by a group of believers. 3. Men who commit adultery do not marry but women who commit adultery, or women who are idolatrous; and women who commit adultery are not married but by men who commit adultery or male idolaters, and such things are forbidden to those who believe. "(Surat: An-Nur: 2-3)

This verse explicitly mentions the lashing sanction for the perpetrators of adultery of ghairu muhsan. In this verse, it is not only mentioned about the number of lashes, but the technical implementation is not as if you should be compassionate to the perpetrators and the execution process is witnessed by the Muslims, so that the effects can be felt and become a lesson for others. The following is a hadith which describes the punishment of exile, which means the following:

⁹ As-Sayis, *Tafsir Ayat Al-Ahkam*, Dar Al-Fikr, Beirut, jilid III, page.107

¹⁰ M. Nurul Irfan, *Op.cit.*, page.26

¹¹ *Ibid*, page.20

"From Ubadah bin Shamit, he said," The Messenger of Allah said, take me, take me. Verily Allah has made them a way out, virgin adulterers whipped one hundred times and banished for one year, while adulterers of widower with widows are whipped a hundred times and stoned (HR.Muslim and Abu Dawud). From the hadith it can be seen that the punishment for the perpetrators of ghairu muhshan's Jarimah adultery is whipped one hundred times and exiled. Regarding the caning, the cleric has agreed. However, regarding the sentence of exile the scholars disagree, whether the two penalties are applied together or not.¹² For the last type of punishment (exile), according to Imam Malik and Auza'i, it cannot be applied to women. Meanwhile, according to Imam Asy-Syafi'i, Ahmad, and Dawud Azh-Zhahiri, the sentence of exile remains in force, both for men and women.¹³

The evidence of adultery in Islamic criminal law is as follows:

- 4 male witnesses who directly saw the adultery. Of course this is not easy, because of the threat of eighty lashes for those who are not proven adulterers of adultery.
- Recognition. The Messenger of Allah had suspended stoning to Ma'iz until he claimed four times, because the apostle doubted Ma'iz's sense of health. Even Ma'iz was returned to his tribe to be asked whether his reasoning was healthy and after that it was stoned.
- Certain indications, such as pregnancy.

2. Legal Review of Criminal Acts of Adultery and Its Sanctions According to Indonesian Criminal Law

The formulation of adultery is the Criminal Code regulated in Article 284, the following is the sound and a little explanation about Article 284 of the Criminal Code:

(1) Threatened with a maximum imprisonment of 9 months:

1. a. A man who has married, who is doing an overspel, even though it is known that Article 27 BW applies to him.
- b. A married woman who does it.
2. a. A man who participated in the act, even though he knew that those who were guilty had married.
- b. A married woman who participates in the act, even though it is known by her that the guilty party has married and Article 27 BW applies to him.

¹² M. Nurul Irfan, *Op.cit.*, page.75-76

¹³ *Ibid*, page.80

(2) There is no prosecution but a complaint from the spouse who is polluted, and if for them applies Article 17 BW, within a period of three months followed by a request for divorce or separation of tables and beds for certain reasons.

(3) This article does not apply to Article 72, Article 73 and Article 75 BW.

(4) Complaints can be withdrawn as long as the hearing in a court hearing has not yet begun.

(5) If the husband and wife apply Article 27 BW, the complaint is not heeded during marriage had not been decided because of divorce or before a decision stating separate tables and beds be fixed.

Article 27 BW (*Burgerlijk Wetboek*) or the Civil Code stipulates that "in the same time a man is only allowed to have one woman as his wife, a woman is only one man as her husband." absolute monogamous principle. Article 27 BW is similar to the formulation of Article 3 paragraph (1) of Law No. 1 of 1974 concerning Marriage. However, the Marriage Law determines that exceptions in Article 3 paragraph (2) are related to Article 4, Article 5, and Article 65, that it is possible for a husband to carry out polygamy provided that he meets the conditions specified in the law, namely the alternative conditions (Article 4) and cumulative terms (Article 5).

All of these must be linked to Article 1 and Article 2 paragraph (1) of the Marriage Law. According to Prof. Dr. Bagir Manan, former Chair of the Supreme Court of the Republic of Indonesia, stated that marriage that fulfills the requirements of Article 2 paragraph (1) is valid, and that this is a "legal event".¹⁴

D. Conclusion

1. Summary

- a. Adultery in the Islamic criminal law is divided into two, namely adultery committed by the perpetrator who is married (adultery muhsan) and adultery carried out by an unmarried offender (zina ghairu muhsan). Sanctions in the form of stoning are applied for minasan adultery. This punishment of zina muhsan is not explicitly confirmed in the Qur'an, but regarding the stoning penalty for the muhsan adulterers, this is explicitly confirmed in several hadith, which the hadith is the second source of Islamic law after the Qur'an. And for the stoning penalty on the perpetrators of muhsan adultery in the hadith was also followed by most of the Companions of the Prophet Muhammad. Then for ghairu muhsan adultery, punishment or sanction in the

¹⁴ Bagir Manan, Dalam Seminar Hukum Keluarga, diselenggarakan oleh Mahkamah Agung RI, pada Sabtu 1 Agustus 2009, di Hotel Redtop, Jakarta Pusat.

form of blasphemy or whipping a hundred times is imposed, this is explicitly confirmed in the Al-Qur'an

- b. The formulation of adultery offenses in positive criminal law in Indonesia is stated in Article 284 of the Criminal Code, and the perpetrator is only sentenced to imprisonment for a maximum of nine months, besides that it is not included for adulterers whose one and/or each is not in bond marriage. Article 284 of the Criminal Code will be a criminal act or violate the law if there is a complaint from one of the couples who feel polluted due to the act. If the perpetrator is silent, then clearly no one feels polluted or harmed, and if no one feels polluted or harmed, then not punished.

2. Suggestions

- a. There is a seriousness of the law-making institution in Indonesia (DPR-RI) to reform Indonesian criminal law, because it is time for criminal law in Indonesia to follow the development of its society;
- b. The role of the community is to be further enhanced in preventive efforts to monitor and develop the morality of the Indonesian people so that the community does not commit adultery, and if there is adultery in their environment, it is expected to avoid vigilante efforts against these adulterers.

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