



Delik Zina Controversy in the Kuhp

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ABSTRACT. Laws are compiled and made based on various considerations and adapted to the circumstances as well as the needs of society, based on this, the Indonesian government officially establishes a new Criminal Code (KUHP). The new Criminal Code is now registered through Law Number 1 of 2023. Fundamental changes to the elements of criminal acts in the latest Criminal Code still leave various polemics in society. Articles 411 to 413 of the Criminal Code prohibit sexual intercourse between partners without a valid marriage bond. However, this article is an absolute complaint offense which can only be subject to an element of crime if there is a complaint from a married husband or wife and parents or unmarried children. This article examines the controversies of adultery offenses in the latest Criminal Code as well as the views of Islamic law. adultery in the latest Criminal Code is considered not fulfilling the sense of justice of religious people. Therefore, it is necessary to review changes to adultery arrangements in the latest Criminal Code so that they reflect the religious, social and moral values that live in society.

Keywords: Islamic Law, Offense, Adultery

1. Introduction

As a country where Indonesia has ethnic, cultural and religious diversity, understanding multiculturalism is a very important issue in governance (Mubit, 2016) . By law, Indonesia recognizes 6 religions namely Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism. Approximately 87% of Indonesia's population is Muslim (Rosman, 2016) . Indonesia is a country based on Pancasila and the 1945 Constitution of the Republic of Indonesia. All laws and regulations in force in this country may not conflict with Pancasila and the 1945 Constitution of the Republic of Indonesia. Pancasila is the basis of the State philosophy and Indonesian philosophical view. Therefore it is a must that in every aspect of the administration of the State must be sourced from the values of Pancasila, including the system of laws and regulations in Indonesia (Kaelan, 2014) .

Indonesia is currently in the midst of protests from various groups against the renewal of the Criminal Code (KUHP) as part of a comprehensive national law reform effort. The renewal effort was not only due to the reason that the Criminal Code that was enacted last year was deemed no longer in accordance with the demands of societal development (Irawan, 2019) , but also because the Criminal Code was nothing more than a product of Dutch colonial heritage, and therefore was not in accordance with the views of the Indonesian nation which independent and sovereign (Sulaeman, 2008) . Crimes against decency, especially the offense of adultery, is an actual example of a conflict between the meaning and understanding of adultery in the Criminal Code and the interests or social values of society. Clashes that often occur in society, often give rise to new crimes such as murder, persecution, or vigilanteism.

In the Criminal Code, the offense of adultery is regulated in Chapter XV Article 411 of the Criminal Code which can be categorized as a crime against decency. In that article, the

Criminal Code stipulates that the act of intercourse committed by anyone with another person who is not a husband or wife is included in the criminal act of adultery. In this offense it is stated that the criminal act cannot be prosecuted except for complaints from husbands or wives who are bound by marriage and/or parents or children for those who are not bound by marriage, meaning that this offense is an absolute offense. However, the nature of the offense is an absolute complaint, making Article 411 of the Criminal Code reap controversy among the public. In order to find out what are the causes and reasons for the controversy in the offense, it is necessary to conduct more in-depth research with the title "Controversy on Adultery Delicts in the Criminal Code".

Previous research included a study by Syamsul Huda (Huda, 2015) that looked at adultery from the perspective of Islamic law and the Criminal Code. The discussion revealed differences between adultery in Islamic law and adultery in the Criminal Code, both in terms of the definition and the applicable law. Then, Ika Oktaviani carried out research that was nearly identical (Oktaviani and Agusmidah, 2023) and focused on the topic of Legal Renewal and a Religious Sense of Community Justice: Regulation of the Criminal Act of Adultery in the Most Recent Criminal Code, the Zina article found in the Criminal Code goes against religious and moral principles. In addition, Helmalia Cahyani's research (Cahyani et al., 2022), the findings of research on a number of offenses in the Criminal Code must be revisited, and additional research is required to adapt to the community's sociocultural conditions

2. Research Methods

This research was carried out using empirical normative, by examining the concepts and real behavior (*actual behavior*), which shows social symptoms that are neither real nor written, experienced by society or individuals in social relations in social life (Miswardi, Nasfi, and Antoni 2021). The method of this research is in the form of sociological legal research which includes research on the legislation that has been stipulated, as well as the effectiveness in the application of law in society. (Fajar and Achmad 2010) Then the source of data from this research is a review of the literature and literature and legislation related to this research and references that are in accordance with the research study.

3. Research Results and Discussion

3.1 Zina in Islamic Law

According to (Mujieb, 2002), zina is intercourse between a man and a woman without a valid marriage, or inserting the male genitalia into the female genitalia up to the hasyafah limit (the head of the testicles). Abdul Halim Hasan says that adultery is when a man puts his genitals in a woman's genitals without marrying or having a child. This definition is almost identical to Abdul Djamali's, which states that adultery is the act of inserting a man's genitals into the desired female genitalia up to his neck (Djamil, 2002).

In the meantime, scholars of fiqh believe that inserting the penis into an illegal vagina without a subhat is adultery. Ibn Rushd also says that adultery is having sexual relations that don't happen because you own a slave or because you have a valid or false marriage. In contrast, Hamka defines adultery as "any intercourse that is not legalized by marriage" or "whose marriage is not legal" in another juzu'. Hamka defines adultery as "all intercourse outside of marriage" (Hamka, 1983).

The definition of adultery in the Encyclopedia of Islamic Criminal Law is different according to different schools of thought, but the meaning is the same: sexual activity between a man and a woman performed by an amukallaf who is not bound by a legal

marriage. Adultery is a crime that can be punished by *udd* or *hadad*, which refers to a punishment for violating Allah's rights. The Koran regulates the punishment for adultery because Allah SWT has the right to do so. absolutely. There are two kinds of fornication, and those who commit them are required to be punished: (Huda, 2015) *muhsan* and *Ghairu Muhsan*. *Muhsan*, is an infidelity a full grown, intelligent, independent committed by an individual is developed, wise, free and has been lawfully blended in with a person of another sex.

Stone stoning is the punishment for *muhsan* adulterers (Nurmila, 2019). *Rajam* is capital punishment by stoning. The statement of Umar ibn al-Khattab, who witnessed the Prophet Muhammad SAW ordering stoning for men, is the only evidence that the Koran supports the law of stoning. The claim is that Sayyidina Umar bin al-Khattab narrated the hadith. He stated, Indeed, Muhammad was sent by Allah to see. with the truth and has delivered the Koran to his majesty. A verse about the stoning law was one of the things that were shown to him. The verse is always read, kept, and considered by us. Rasulullah observed. have carried out the stoning punishment, and we also carried out the punishment in honor of your majesty. Toward the finish of time I'm worried about the possibility that there will be individuals who will say: " We do not find the punishment of stoning in the book of Allah, which is the Koran. This means that they will go astray because they break one of Allah's obligations. According to (Djamil 2002), "if there is clear evidence or she is pregnant or with her own confession, the stoning punishment must be carried out for adulterers who have ever been married, both men and women."

Ghairu Muhsan, or adultery committed by individuals who have not legally married (Rokhmadi, 2015). This indicates that adulterers, specifically those who are not married, remain single or virgins. According to QS al-Nur, adulterers with *ghair muhsan* status are subject to one hundred floggings: 2. This verse talks about being firm when enforcing the *hadad* penalty and saying that it is against the law to show mercy when enforcing punishments for the abominations committed by the two adulterers. It also says that it is against the law to either cancel the *hadd* penalty or be gentle when enforcing it. As a result, it is forbidden to withhold Allah's rights and delay the implementation of His religion. In order to be expected to have a deterrent effect, the punishment should be carried out in front of a large audience, specifically a group of believers..

Flogging can be carried out in a number of different ways. Imam Malik claims that the back and the area around it were beaten, and the victim was forced to undress. Imam Syafi'i claims that all limbs were beaten, with the exception of the face and genitals, which were forbidden, and undressing. All parts of the body, with the exception of the genitalia, face and head, and clothing, according to Abu Hanifah. According to Ibn al-Munir, who stated: "The perpetrators of adultery *ghair muhsan* were also exiled for a year." This is in addition to being beaten a hundred times. in the case of a maid who had an affair with the daughter of her employer, the Messenger of Allah. swore that he would make his decision from Allah's Book. The servant was then ordered to be exiled for a year and punished with one hundred floggings, he said (As-Syaukani, 1999).

3.2 Criteria for Zina in Islamic Law

In Islamic law (Yasir, Widodo, dan Ashar 2022), adultery is only punishable if it satisfies several adultery elements. First, having legal and planned sexual activity outside of marriage. Even if there is no erection, having sexual relations is still considered adultery if

the hasyafah (testicles) are submerged on the penis. The perpetrators are also aware that their behavior is against the law. In the crook demonstration of infidelity, male and female miscreants are expected to have aim or expectation to abuse the law. If the offender is aware that he is having sexual relations with a woman who is against his law, his intent to break the law is considered fulfilled. Also, if a woman who commits adultery gives herself up and is aware that the person having sexual relations with her is against her legal rights.

Second, amukallaf is responsible for the crime. Islam says that if it is proven that a mulatto has committed adultery, they can all be punished with hudud, whether they are married or not. According to syar'i, adultery is not committed by a child or insane person who has sexual relations outside of marriage, nor is it committed by an idiot whose paramedics acknowledge this deficiency. Thirdly, adultery is sexual activity that is committed with intent and without coercion. This means that the parties involved have agreed to commit adultery without being coerced. Rape is forced sexual activity. If one party is forced, he is the victim rather than the perpetrator. The perpetrator in this rape case still faces punishment, but the victim does not.

Fourthly, adultery is supported by evidence. There are three pieces of evidence that can be used to prove adultery: a) Witnesses: Experts concur that four witnesses are necessary to establish adultery. This is the agreement of the researchers. Four mature, intelligent, hifzun (capable of remembering), able to speak, able to see, fair, and Muslim men must provide evidence of adultery. b) Confession: Imam Malik and Imam Syafi'i argue that a single confession is sufficient to impose a sentence. Al-Tabari, Abu Saur, and Ibn Dawud all shared this opinion. In the meantime, Imam Abu Hanifah and his followers, Ibn Abi Lala, Imam Amad, and Ishaq, argued that adultery could only be punished if confessions were made four times, one at a time, in various locations. c) According to the Qarinah (indication) (Haliman, 1970), a woman's pregnancy obligates her to be subject to a hadd penalty if she does not have a husband or owner.

3.3 Adultery Delict Controversy in the Criminal Code

The term complaint offense (klacht delict), in terms of the meaning of the word klacht or complaint, means a crime which can only be prosecuted after a report has been made with a request to prosecute a person or a particular person. For complaint offenses, the prosecutor will only prosecute if there have been complaints from people who have suffered and been harmed by the crime. Arrangements for complaint offenses have been explained in general in Book I of the Criminal Code, then for detailed clarity can be found in Book II. Each offense made by the legislature is made into a complaint offense, states this matter separately, and in the provisions referred to at the same time it is also indicated who has the right to file the complaint.

The legislators have required that there be a complaint for certain offenses (Daipon, 2020). The reason according to Von Liszt, Berner and Von Swinderen is that when viewed objectively in certain offenses, the material or ideal loss of the person directly harmed must take precedence over other losses in general. According to MvT (Memori van Teolichting), the requirement for a complaint on certain offenses is based on the consideration that the intervention of the authorities in a certain case may bring greater harm to the interests of certain people who have been harmed than in reality, namely if the authorities have not interfered in certain cases. So that the decision whether someone who has harmed needs to be prosecuted or not by the authorities, this is left to the consideration of the person who has felt harmed (Riyanto, 2004).

Complaint offenses are divided into two types, namely absolute klacht delict, namely each crime committed, which can only be prosecuted by the public prosecutor if a complaint has been received from the person entitled to complain about it. Pompe argued that an absolute complaint offense is an offense which basically, the existence of a complaint is a *voorwaarde van vervolgbaarheid* or a requirement for the perpetrator to be prosecuted. Relative complaint offenses (relative klacht delict), namely crimes committed which are not actually complaint crimes, but specific to certain matters, are actually required as complaint offenses. According to Pompe, a relative complaint offense is an offense in which the existence of a complaint is only a *voorwaarde van vervolgbaarheid* or a condition for being able to prosecute the perpetrator, that is, when the guilty person and the person who is harmed has a special relationship (Jamba, 2015).

Adultery offenses In the Criminal Code, Article 411 of the newest Criminal Code has expanded the substance of adultery offenses by not distinguishing between those who are married and those who are not married, nor does it differentiate between men and women in committing criminal acts. This means that anyone who has intercourse with another person, whether married or not, can be said to be an act of adultery.

Adultery offenses in the Criminal Code still use absolute complaint offenses, those who have the right to complain about adultery offenses are married husband or wife and unmarried parents or children. This became the background for the emergence of controversy among the people. Those who are pro against the Criminal Code are of the view that the offense of adultery in the Criminal Code is quite perfect with the provision of complaint offenses. It can be said that only certain people who have been confirmed by law can report the crime of adultery to the authorities. Then there are also those who think that the government is right in establishing the new Criminal Code, especially against adultery offenses, if it is not regulated, adultery will eventually be considered as normal and fear it will become a tradition among the public (Kurnianto, 2019). Then the opposing party is of the view that the adultery offense contains the concept of sexual freedom, then the offense is considered to threaten family resilience in Indonesia which ultimately threatens national security.

With its nature as an absolute complaint offense against a backdrop of liberalistic individualistic Western European culture, making the adultery offense in the Criminal Code contradicts Islamic law which regulates that the punishment of adulterers is carried out openly in public and can be complained by anyone. As well as contradicting the social and cultural structure of Indonesian society which is familial, collectivistic and monodualistic (Syahanti and Rosman, 2018). In Indonesian society, adultery is no longer a private matter, but a dangerous social and religious problem and disease. The bad impact of adultery does not only affect the perpetrators and their families, but also damages the moral order of society. Thus it is very unwise to place the offense of adultery as an absolute complaint offense.

4. Conclusion

In Islamic law, adultery is divided into two types, namely muhsan adultery and ghairu muhsan adultery. The provisions for adultery sanctions in Islam are one hundred lashes or volumes and exile for one year. In the latest Criminal Code, it is explained that anyone who has intercourse with another person, whether married or not, can be said to be an act of adultery.

The newly enacted Criminal Code still reaps a lot of controversies, including those contained in Article 411 concerning adultery. The article makes the adultery offense an

absolute complaint offense, this makes the article on adultery reap controversy among the public. There are two groups that are conflicting with each other, namely the religious group and the liberal group. The controversies that have arisen show that the existing adultery arrangements in the Criminal Code have not shown that the Adultery offenses contained in the new Criminal Code are still not effective in dealing with adultery problems in Indonesia.

Based on the results of the research and analysis conducted, the authors suggest that Article 411 be reviewed again and replaced with a more effective law to prevent adultery. Then the government should have made separate regulations for the act of adultery for each religion in Indonesia, especially Islam, which is predominantly adhered to by the Indonesian population. Bearing in mind that in Islam the law of adultery is *a hudud finger* whose punishment is absolutely the right of Allah SWT.

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