

Criminal Acts of Adultery Based on Islamic Law and Positive Law in Indonesia

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Abstract

Adultery is a complex social phenomenon that raises various moral, social, and legal issues in Indonesia. The existence of positive legal regulations and sanctions within Islamic law shows different approaches in addressing this problem; however, their effectiveness still requires comprehensive analysis. This study aims to compare the concepts, sanctions, and enforcement mechanisms regarding adultery according to Islamic law and positive law in Indonesia. The method used is normative research with literature analysis of laws and regulations, fiqh texts, and legal literature from both national and Islamic perspectives. The results indicate that the application of sanctions under Islamic law, such as stoning and flogging, has a more effective preventive and curative impact in combating adultery compared to lighter criminal sanctions under positive law, which is based on *delik aduan* (complaint-based offenses). Enforcement of Islamic law is also more effective and efficient because it is grounded in a strict system of evidence that does not rely on third-party advocacy, unlike the subjective and limited nature of positive law systems. The contribution of this research is to provide guidance for developing a more just and humane criminal law policy, as well as integrating sharia values into Indonesia's legal reforms.

Keywords: Adultery, Islamic Law, Positive Law, Evidence, Sanctions, Legal Reform

Abstrak

Perbuatan zina merupakan fenomena sosial yang kompleks dan menimbulkan berbagai persoalan dari segi moral, sosial, serta hukum di Indonesia. Keberadaan peraturan hukum positif dan sistem sanksi dalam Islam menunjukkan pendekatan yang berbeda dalam menanggulangi masalah ini, namun efektivitasnya masih perlu dikaji secara komprehensif. Penelitian ini bertujuan membandingkan konsep, sanksi, dan mekanisme penegakan hukum terkait perzinaan menurut sistem hukum Islam dan hukum positif di Indonesia. Metode yang digunakan adalah studi normatif dengan analisis literatur dari peraturan perundang-undangan, pengkajian kitab fiqh, dan literatur hukum nasional serta Islam. Hasil penelitian menunjukkan bahwa penerapan hukuman dalam sistem hukum Islam, seperti rajam dan dera, memiliki dampak preventif dan kuratif yang lebih efektif dalam menanggulangi perzinaan dibandingkan dengan hukuman pidana dalam hukum positif yang cenderung ringan dan berbasis *delik aduan*. Penegakan hukum menurut Islam juga bersifat lebih efektif dan efisien karena didasarkan pada sistem pembuktian yang ketat dan tidak bergantung pada advokasi pihak lain, berbeda dengan sistem hukum positif yang masih bersifat subjektif dan terbatas. Kontribusi dari penelitian ini adalah memberikan panduan dalam pengembangan kebijakan hukum pidana yang lebih adil dan berkeadaban, serta mengintegrasikan nilai-nilai syariat dalam reformasi hukum Indonesia.

Kata Kunci: Perzinaan, Hukum Islam, Hukum Positif, Pembuktian, Sanksi, Reformasi Hukum

INTRODUCTION

Adultery, or sexual relations outside a valid marriage, has long been a prominent issue in various aspects of Indonesian society, from moral, social, to legal perspectives. In Islamic religious study, this act is strictly forbidden and subject to sanctions in accordance with sharia law, while in the positive legal system of Indonesia, it is regulated by various legislative provisions that also penalize adulterous acts. Both indicate that adultery is not only a moral issue but also a pressing legal matter that needs to be regulated firmly and consistently. This phenomenon becomes increasingly complex and dynamic with the development of the times, especially with the emergence of new regulations and legal reforms.

As we know, adultery is a complex problem faced by humanity. It is not a taboo issue in Indonesia. Literally, adultery refers to an unlawful act where a man and a woman engage in sexual relations without a legitimate marriage bond. Adultery is an act of intimate relationships carried out by two people—a man and a woman—who do not have prior marriage ties. It is considered a wrongful and impure act that breaches religious, legal, and cultural values.¹ Juridically, the regulation of adultery is found in Article 284 of the Criminal Code (KUHP), which stipulates that adultery is a sexual act performed by a man and a woman who are already bound by marriage, with a maximum penalty of nine (9) months imprisonment. Article 284 adopts an absolute offense approach. Enforcement can only proceed if there is a complaint from the harmed party, such as the husband or wife, as outlined in Articles 72, 73, and 75 of the KUHP.

The urgency of regulating adultery in the law reveals a legal loophole that allows offenders to commit adultery. However, how is the legal stipulation against unmarried or never-married perpetrators? This is reinforced by the rising trend of free sex among teenagers or singles in Indonesia. This view provokes opposition among societal segments that uphold high moral and ethical values.² Although the majority of Indonesian society is Muslim, adultery is regarded as a disgraceful act that tarnishes national morality. It is considered to have negative impacts, such as damaging bloodlines/lineage, destroying marriage relationships, and causing sexually transmitted diseases (HIV/AIDS).

Article 284 is seen as conflicting with the principles of divine values as expressed in Article 29 of the 1945 Constitution, which states that Indonesia is a nation based on the One Supreme God. Thus, practices that violate divine values are considered to have breached the law. Meanwhile, recent criminal law policies concerning adultery have expanded the meaning. Articles 411-413 of Law Number 1 of 2023 have broadened the definition of adultery. Article 411 paragraph 1 of Law No. 1 of 2023 states that adultery is not only punishable for those already bound by marriage but also for those who are not. However, the sanctions given to offenders are relatively mild, only one year

¹ Widya Dwi Hapsoro, "The Law Enforcement against Adultery Crime Actors" 1 (n.d.): 1030.

² Anyta Widiati, Amri Tajuddin, and Abdullah, "Relasi Agama dan Negara di Indonesia: Tinjauan Historis dan Perkembangan Kontemporer," *CBJIS: Cross-Border Journal of Islamic Studies* 6, no. 2 (December 28, 2024): 325–36, <https://doi.org/10.37567/cbjis.v6i2.3487>.

imprisonment. Furthermore, Article 411 makes it difficult to enforce the law since prosecuting requires a *delik aduan*, similar to Article 284 of Law No. 1 of 1946.

In contrast, Islamic law defines adultery as a sexual relation outside a legitimate marriage conducted by a man and a woman, whether or not they have previously been married.³ In Islamic criminal law, adultery is called “*jarimah zina*”—a sin committed between a man and a woman who are not bound by a valid marriage. In Islam, perpetrators are classified into two groups: *muhson* and *ghairu muhson*. *Muhson* refers to an adulterer who is mature (*baligh*), legally responsible (*mukallaf*), and has been previously married, while *ghairu muhson* refers to someone who is mature and responsible but has never been married. The punishment for *muhson* is stoning (*rajm*), while for *ghairu muhson*, punishment involves 100 lashes and one year of exile.⁴ The main goal of Islamic law is to protect religion, lineage, life, reason, and property.⁵ Additionally, Islamic criminal law does not require a *delik aduan* but relies on systems of proof such as confessions, the testimony of four *mukallaf* witnesses, pregnancy, or a declaration (*ikrar*). This emphasizes that the negative impacts of adultery are not only moral or social but also pose a direct threat to the health of the younger generation. Therefore, the regulation of adultery from both Islamic and positive legal perspectives is crucial as foundational material for future legal reform considerations.

This study is a comparative legal analysis, inspired by Romli Asasmita, who states that comparative law is a method of comparing one legal system with another and deriving conclusions from those systems.⁶ By comparing the concept of adultery between two legal systems—Islamic law and positive law—the study aims to shed light on differences and similarities. Several previous studies have examined aspects of adultery from various perspectives, such as research by Usman et al.,⁷ Rahmasari,⁸ Kurniawan et

³ Deden Najmudin et al., “Studi Komparatif Hukum Positif Dan Hukum Pidana Islam Tentang Jarimah Zina,” *Causa: Jurnal Hukum Dan Kewarganegaraan* 1, no. 11 (December 24, 2023): 61–74.

⁴ Kahar Muzakir, “Zina Dalam Perspektif Hukum Islam dan Kitab Undang Undang Hukum Pidana” 1, no. 1 (n.d.): 36.

⁵ Aghnat ‘Aliyah et al., “Tinjauan Hukum Pidana Islam Terhadap Pembuktian Jarimah Zina,” *Tashdiq: Jurnal Kajian Agama Dan Dakwah* 1, no. 3 (December 24, 2023): 31–40, <https://doi.org/10.4236/tashdiq.v2i1.1514>.

⁶ Djoni Sumardi Gozali, *Pengantar Perbandingan Sistem Hukum*, 1st ed. (Bandung: Penerbit Nusa Media, 2018), 1.

⁷ Usman Usman, Sri Rahayu, and Elizabeth Siregar, “Urgensi Penyerapan Nilai Hukum Islam Dan Hukum Adat Dalam Pengaturan Tindak Pidana Perzinaan,” *Undang: Jurnal Hukum* 4, no. 1 (June 5, 2021): 125–57, <https://doi.org/10.22437/ujh.4.1.125-157>.

⁸ Rizkia Rahmasari, “Analisa Makna ‘Persetujuan’ Dalam Pemendikbud Ristek No. 30 Tahun 2021 Terhadap Fenomena Kekerasan Seksual Di Lingkungan Pendidikan Yang Dianggap Sebagai Upaya Legitimasi Terhadap Perzinaan,” *Jurnal Penegakan Hukum Dan Keadilan* 3, no. 1 (April 21, 2022): 78–89, <https://doi.org/10.18196/jphk.v3i1.13484>.

al.,⁹ Ashari and Hasan,¹⁰ Syafitri et al.,¹¹ Ngema and Iyer,¹² Maimunah et al.,¹³ and Abikan.¹⁴ However, existing literature still lacks depth in comprehensively comparing the application of these two legal systems and their impact on national criminal policy. Additionally, studies that simultaneously explore the social realities and legal aspects have not been widely conducted.

Different from previous studies, this research will systematically discuss the comparison of concepts, sanctions, mechanisms of proof, and the socio-political context of Islamic law and positive law related to adultery in Indonesia. This study also integrates juridical and sociological analyses, addressing contemporary challenges such as the practice of free sex and the enforcement of just laws. Through an in-depth comparative approach and policy recommendations, it is hoped to enrich knowledge and make a tangible contribution to the development of criminal legal policies in Indonesia, as well as to strengthen the moral foundation and diversity of the nation.

RESEARCH METHOD

This research uses a normative legal approach with documentary study techniques, namely data collection through examining documents such as legislation, fiqh literature, legal books, and relevant journal articles selected selectively. The collected data is then examined in detail by organizing it, interpreting its meaning, and comparing the legal systems of positive law and Islamic law regarding adultery, focusing on important aspects, rules, penalties, and ways to prove cases. This analysis is conducted critically and systematically to uncover similarities, differences, and their relevance to Indonesia's social and cultural context, thereby producing a comprehensive overview along with relevant and progressive legal policy recommendations.

RESULTS AND DISCUSSION

⁹ Teguh Kurniawan Z, Adelina Mariani Sihombing, and Aurelia Berliane, "Konstruksi Politik Hukum Pidana Terhadap Delik Perzinaan Dalam Rancangan Kitab Undang-Undang Hukum Pidana," *Binamulia Hukum* 12, no. 1 (July 4, 2023): 11–24, <https://doi.org/10.37893/jbh.v12i1.445>.

¹⁰ Hardianti Ashari and Hamzah Hasan, "Kriminalisasi Terhadap Perempuan Dalam Makna Perzinaan; Studi Komparasi Antara Sistem Hukum Positif Dan Pandangan Ulama Mazhab," *Shautuna: Jurnal Ilmiah Mahasiswa Perbandingan Mazhab*, February 24, 2022, 25–40, <https://doi.org/10.24252/shautuna.vi.23228>.

¹¹ Nova Trisna Dwi Syafitri et al., "Efektivitas Sanksi Adat Sebagai Alternatif Hukum Bagi Pelaku Perzinaan Menurut Hukum Islam," *Journal Customary Law* 1, no. 2 (April 22, 2024): 10–10, <https://doi.org/10.47134/jcl.v1i2.2360>.

¹² Nqobizwe Mvelo Ngema and Desan Iyer, "Penalty for Committing Fornication & Adultery (Zina) in Islamic Law as a Violation of Freedom from Torture," vol. 15 (16 International Conference on Sustainable Development at the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), Bangkok: OIDA International Journal of Sustainable Development, Ontario International Development Agency, 2022), 11–18, https://oidaijsd.com/?page_id=2710.

¹³ S. Maimunah et al., "Effectiveness Knowledge of the Prohibition of Zina in Islam towards Pre-Marriage Sex Students at Nurul Huda Islamic Boarding School Surabaya," *Bali Medical Journal* 12, no. 3 (2023): 2805–7, <https://doi.org/10.15562/bmj.v12i3.4353>.

¹⁴ Yahaya Ibrahim Abikan, "Examining the Admissibility or Otherwise of Evidence Generated from Closed-Circuit Television (CCTV) and Deoxyribonucleic Acid (DNA) Test as Means of Proof of Zina Under Islamic Law," *Al-Manahij: Jurnal Kajian Hukum Islam* 17, no. 1 (May 5, 2023): 83–96, <https://doi.org/10.24090/mnh.v17i1.8172>.

The Provisions of Criminal Acts of Adultery According to Islamic Law

Islamic criminal law is known as *fiqh jarimah*, which means a set of rules that govern criminal acts or offenses committed by a *mukallaf* (someone who has reached puberty and is sane), whether individually or collectively, that disturb security and tranquility of others and violate the rights of Allah derived from the Quran and Sunnah.¹⁵ The sources of Islamic law are first, the Quran; second, Hadith; third, Ijma; and fourth, Qiyas. These sources serve as the foundation for decision-making and help address contemporary legal issues while remaining consistent with the basic principles of Islam.

In Islam, the imposition of punishment is based on the classification of actions according to Islamic criminal law. The types of punishments include, (1) Hudud crimes, which are serious offenses considered violations against Allah's decrees; punishments for such cases are generally based on the rights of God, as explained in the Holy Quran. Examples include alcohol abuse, slander (*fitnah*), adultery, theft, apostasy, and robbery. (2) *Qisas* refers to crimes that have been committed, even though the legal regulation may not directly originate from the Quran, but are embedded within legal concepts. These crimes usually stem from judicial, academic, and political systems. They include intentional (*culpa*) or unintentional acts against others, such as assault, voluntary or involuntary murder, and killing. The punishment often involves compensation, retribution, or parity of punishment. (3) *Ta'azir* crimes describe violations for which the punishment is not explicitly stated in the Quran. Thus, jurisdiction arises based on guidance and teachings from Prophet Muhammad, as defined within the Quran and Sunnah. These crimes can include lying under oath, bribery, embezzlement, or rehabilitation, and are typically prosecuted with various punishments.¹⁶

Therefore, based on these points, adultery is classified as an act that can be subject to hudud or *jarimah* hudud punishments, which directly violate Allah's law.¹⁷ The term *zina* (adultery) is referred to as *fahisyah*, meaning a despicable or disgusting act, as explained in Surah Al-Isra' verse 32 of the Quran:

وَلَا تَقْرَبُوا الزَّيْنَىٰ إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا ﴿٣٢﴾

Meaning: "Do not go near adultery. It is truly a shameful deed and an evil way."

Based on the interpretation of the above verse, not only the act of *zina* itself, but even approaching it is prohibited.¹⁸ According to Islam, *zina* is a sexual relationship carried out between a man and a woman where there is no lawful marriage bond.¹⁹

¹⁵ Sufriadi Ishak, "Teori-Teori Penghukuman Dalam Hukum Islam: (Perbandingan Dengan Hukum Pidana Umum)," *Ameena Journal* 1, no. 1 (February 9, 2023): 89–100.

¹⁶ Ishak.

¹⁷ Nunung Dian Wahyuningsih, "Perbandingan Hukum Perzinahan Dalam UU No. 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana (KUHP) Dengan Hukum Islam," *Journal of Law, Society, and Islamic Civilization* 11, no. 2 (October 27, 2023): 97–108, <https://doi.org/10.20961/jolsic.v11i2.76466>.

¹⁸ Aidul Fitriawan, "Konsep Fahishah Dalam Al Qur'an; Studi Kajian Tematik Dalam Perspektif Tafsir," *Al Furqan: Jurnal Ilmu Al Quran Dan Tafsir* 6, no. 2 (December 20, 2023): 162–75, <https://doi.org/10.58518/alfurqon.v6i2.2066>.

¹⁹ H. Z. Ali, *Hukum Islam: Pengantar Ilmu Hukum Islam Di Indonesia* (Jakarta: Sinar Grafika, 2022), 106.

According to Islamic legal scholars (*fuqaha*), zina is defined as the act of inserting a male's penis into a forbidden female's genitals (*farji*), driven by lust. This means that zina can be classified as such if the head of the penis (male genital organ) enters the female genitalia, even slightly, performed out of desire without coercion. Furthermore, some scholars' views on zina include: (1) The *Malikiyah* school opines that zina is sexual intercourse done by a *mukallaf* (a person who is sane and has reached puberty), with a woman who is not his wife, with deliberate intent and mutual agreement. (2) The Hanafi school states that zina is unlawful sexual intercourse that violates *shari'ah*, using the female genital organ while the woman is still alive, without coercion, performed by a Muslim man on a woman who is not his. (3) The Shafi'i school defines zina as an act that is haram, involving inserting the penis (male genital organ) into the penis without doubt, which tends to arouse lust. (4) The Hanbali school defines zina as performing an act of lewdness, namely sexual relations between a man and a woman involving either genital organs or anus (not involving genital organs) without marriage.²⁰

Additionally, Islam explicitly regulates zina through the Quran and Sunnah/hadith, which become references in making decisions about punishing those who commit zina. The perpetrators of zina are classified into two groups: (1) Those who are not married (*ghairu muhsan*) (2) Those who are married (*muhsan*). As for the sanctions for unmarried perpetrators (*ghairu muhsan*), they are contained in the Quran, Surah An-Nur, verse 2:

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ
الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ ﴿٢﴾

Meaning: "As for female and male fornicators, give each of them one hundred lashes,¹ and do not let pity for them make you lenient in 'enforcing' the law of Allah, if you 'truly' believe in Allah and the Last Day. And let a number of believers witness their punishment.."

The sanctions for married offenders (*Muhsan*) according to several scholars' opinions are to be stoned to death (hadd of rajm).²¹ This punishment is based on the hadith of the Prophet Muhammad (peace be upon him). From 'Ubadah bin Ash-Shamit, may Allah be pleased with him, the Prophet (peace be upon him) said,

خُذُوا عَنِّي خُذُوا عَنِّي قَدْ جَعَلَ اللَّهُ لَهَنَ سَبِيلًا الْبَكَرَ بِالْبَكَرِ جَلْدُ مِائَةٍ وَتَفِي سَنَةً وَالثَّيْبُ بِالثَّيْبِ جَلْدُ مِائَةٍ وَالرَّجْمُ

Meaning: "Take from me, take from me! Allah has provided a way out for them. (For) a young man who commits zina with a girl, the punishment is one hundred lashes and one

²⁰ S. Nasruddin and Achmad Nurdaim, "Tindak Pidana Zina Menurut UU No 1 Tahun 1946, UU No 1 Tahun 2023 (KUHP) Dan Hukum Islam," *Journal of Law and Nation* 3, no. 1 (2024): 4, <http://joln.my.id/index.php/joln/article/view/81>.

²¹ Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda*, 1st ed. (Jakarta: Gema Insani Press, 2003), 125.

year of exile. (For) two married people who commit zina, the punishment is one hundred lashes and to be stoned.” (HR. Muslim, No. 1690)

From the above explanations, it can be concluded that the evidence requirements are much more stringent for *muhson* adulterers because the offender has denied the blessings given by Allah through a lawful sexual relationship. Meanwhile, *ghairu muhson* adulterers are only subjected to 100 lashes and exiled from their hometown for a year. This is because *ghairu muhson* adulterers have the motive to commit zina before marriage.²²

In enforcing Islamic criminal law against zina offenders, the conditions for Islamic criminal procedure must be met, such as the requirements for evidence. Proof can be obtained from the offender's confession, in which case the punishment can be imposed. Regarding zina, in Islam, proof is divided into four types: (1) Testimony: If there is no confession from the accused, then in a court trial, four adult (*baligh*), sane Muslim men must serve as witnesses or oaths stating they saw the zina act directly. If these four witnesses are present and fulfill the conditions, the punishment can be enforced. However, if fewer than four witnesses are available, the evidence is invalid, and it is very difficult to present four witnesses simultaneously. On the other hand, if someone accuses another of zina but cannot produce four witnesses, the person is guilty of *qadzaf* (false accusation of zina).²³ The accuser must be able to prove their claim; if they fail to do so, they must receive eighty (80) lashes. This Islamic law is enacted to ensure legal certainty and to prevent slander. (2) Confession (*ikrar*): Confession is one way to ascertain or confirm the truth by not denying it. In literal terms, it is informing others about a truth related to human rights and the rights of Allah. (3) Evidence of pregnancy (*qarinah zuhur al-hamli*): One form of proof in Islam is the visible pregnancy of a woman who is not married, which can be used as evidence in a court trial. (4) Rejection of mutual curse (*nukūl an al-mula'anaḥ*): This involves a situation where one spouse refuses to perform *li'an* (mutual cursing). In this context, *li'an* occurs when a husband accuses his wife of zina or denies the child she is carrying, and the wife refutes the accusation.²⁴ The *li'an* process involves each party giving four testimonies, with the fifth declaration stating they are willing to accept Allah's curse if they lie. If either party refuses to take the oath, the process cannot continue, and the accusation cannot be proven.

Provisions of Criminal Acts of Adultery According to Positive Law

Criminal law is the law that regulates acts that are prohibited and forbidden, along with the sanctions imposed on those who violate them. In the form of legal prohibitions, criminal acts are specifically called *Strafbaar feit*. According to Simos, *Strafbaar feit* is

²² Siti Nurkholisoh and Ahmad Soheh Mukarom, "Prohibition of Adultery in the Qur'an" 4 (2021): 717.

²³ Supriani Supriani and Wawan Saputra, "Jarimah Qadzaf (Menuduh Zina) Studi Komparasi Hukum Pidana Islam Dan Hukum Positif Indonesia," *JURNAL DARUSSALAM: Pemikiran Hukum Tata Negara Dan Perbandingan Mazhab* 1, no. 1 (June 26, 2021): 1–23, <https://doi.org/10.59259/jd.v1i1.2>.

²⁴ Sirajuddin Sirajuddin, Risdayani Risdayani, and Dewi Indriani, "Delik Aduan Tindak Pidana Perzinahan dalam Pandangan Hukum Pidana dan Hukum Islam," *BUSTANUL FUQAHA: Jurnal Bidang Hukum Islam* 5, no. 2 (August 30, 2024): 368, <https://doi.org/10.36701/bustanul.v5i2.1717>.

a conduct (handeling) that is illegal, can be threatened with punishment, and capable of being held accountable for the resulting wrongdoing.²⁵ From a historical perspective, Indonesian criminal law still reflects Dutch values and legal interpretations. Thus, every law applied by the Dutch was also implemented in Indonesia based on the principle of concordance. In accordance with Article 1 of the transitional provisions of the 1945 Constitution, it states, "All existing laws and regulations remain in effect until new laws are enacted pursuant to the 1945 Constitution." This means that until Indonesian criminal law is established, colonial Dutch laws still exist and are used to address and combat crimes.

Evidence of Dutch legal inheritance can be seen in the emergence of laws concerning the crime of zina (adultery). In the Indonesian Criminal Code (KUHP), adultery is categorized as an offense against morality. The regulations concerning morality crimes include: (1) Article 284: Sexual relations committed by a man and woman where both or one of the perpetrators is in a legally recognized marriage with someone else. (2) Article 286: Sexual relations committed by a man against a woman who is unconscious or incapacitated. (3) Article 287: Sexual relations committed by a man against a woman whom he knows or should reasonably know is under 15 years old. (4) Article 288: Sexual relations committed by a man against a woman whom he knows or should reasonably know is not of marriageable age; (Article 288).

The types of sanctions in criminal law are codified in the Criminal Code (KUHP) and are emphasized in Article 10, which divides sanctions into two categories: first, principal penalties, and second, additional penalties. Principal penalties include death penalty, imprisonment, detention, fines, and stigma/social sanctions. Additional penalties involve the confiscation and revocation of certain rights.²⁶

In the old KUHP, adultery was referred to as *Oversval* or acts of sexual relations committed by a person already bound by marriage. This was later reaffirmed in Article 284 of the KUHP, which states:

- 1) *Imprisonment for a maximum of 9 months is threatened.*
 - a) *A married man engaging in zina (adultery), even though Article 27 of the Civil Code (BW) applies to him.*
 - b) *A married woman engaging in zina, even though it is known that Article 27 BW applies to her.*
- 2) *A married woman who participates in committing the act, even though she knows that the co-perpetrator is also married and that Article 27 BW applies to her.*
 - a) *No prosecution is conducted unless based on a complaint from the aggrieved husband/wife, and if Article 27 BW applies to them, it is followed within three months by a divorce or separation on grounds of this reason.*
 - b) *Against this complaint, Articles 72, 73, and 75 do not apply.*

²⁵ Suyanto, *Pengantar Hukum Pidana*, 1st ed. (Yogyakarta: Deepublish Publisher, 2018), 69.

²⁶ *Kitab Undang-Undang Hukum Pidana*, n.d.

The definition of adultery in the KUHP (Indonesian Criminal Code) refers to acts of sexual intercourse between a man and a woman carried out consensually. The elements of the criminal act of adultery include: (1) a) The act of sexual intercourse outside of marriage. (2) b) The perpetrator is a married man or woman.

From the explanation of Article 284 paragraph 1, the author criticizes that the legal regulation of adultery in Indonesia only targets those who are legally married, while perpetrators who are unmarried cannot be prosecuted under Article 284 KUHP. This aligns with the Indonesian criminal law principle, namely the legality principle “*nullum delictum nulla poena sine praevia lege*,” meaning no act or crime can be prosecuted without prior legal regulation.²⁷

This implies that indirectly, KUHP provides room for unmarried individuals to engage in such immoral acts. The interpretation of adultery in KUHP is influenced by Western culture, which considers adultery as an act that tarnishes the sanctity of marriage.²⁸ Article 284 KUHP considers adultery solely as cheating—a voluntary sexual relationship by a married person with someone who is not their spouse, using the foreign term “*Voluntary sexual intercourse by a married person with one who is not his or her spouse*.”²⁹ This clarifies that the Dutch-inherited KUHP follows Western ideals of individualism and upholds the absolute monogamy principle, viewing consensual sexual relations as acceptable. Of course, this interpretation is outright rejected by Indonesian society that holds high religious values. The application of this article is vastly different from the Pancasila ideology, which integrates state governance with religion; in contrast, the old KUHP, inherited from the Dutch, is based on liberal ideology.

This is in direct conflict with the religious, moral, and cultural values of a devout society. The lax legal regulations regarding adultery have contributed to the rise of free sex. According to data from BKKBN, about 60% of those aged 16-17 have engaged in sexual intercourse; around 20% aged 14-15, and about 20% aged 19-20. Additionally, BKKBN reports that unintended pregnancies resulting from adultery have led to high abortion rates in Indonesia—2.5 million cases, with 1.5 million among teenagers.³⁰ Furthermore, the high rate of adultery can lead to infectious diseases—most notably HIV/AIDS, which currently has no cure. According to the Ministry of Health, in 2024, the number of new HIV cases increased by 35,415 and new AIDS cases by 12,481 throughout 2024, from January to September.³¹

Moreover, if referred to from the criminal perspective, Article 284 only punishes the perpetrator with a maximum of 9 months imprisonment. This penalty is considered

²⁷ Moeljatno, *Asas-Asas Hukum Pidana*, 9th ed. (Jakarta: Reneka Cipta, 2018), 25.

²⁸ Fandi Leonard Sitorus and Oktavia Purnama Sari Sigalingging, “Pemberian Sanksi Pidana Terhadap Pelaku Zina Berdasarkan KUHP,” *KEADILAN - JURNAL ILMU HUKUM* 3, no. 2 (2024): 1–9.

²⁹ Muzakir, “Zina Dalam Perspektif Hukum Islam dan Kitab Undang Undang Hukum Pidana,” 40.

³⁰ “Pemerintah Harus Segera Revisi Ayat Soal Penyediaan Alat Kontrasepsi Pada Remaja Di PP 28 Tahun 2024,” Fraksi PKS, August 7, 2024, <https://fraksi.pks.id/2024/08/07/pemerintah-harus-segera-revisi-ayat-soal-penyediaan-alat-kontrasepsi-pada-remaja-di-pp-28-tahun-2024/>.

³¹ “Kemenkes Catat 35 Ribu Kasus HIV Baru Sepanjang 2024,” *gaya hidup*, accessed April 28, 2025, <https://www.cnnindonesia.com/gaya-hidup/20241202104452-255-1172755/kemenkes-catat-35-ribu-kasus-hiv-baru-sepanjang-2024>.

very light and does not serve as a deterrent. Essentially, criminal law is an instrument that inflicts suffering to achieve the purpose of punishment.³² The purposes of punishment include: first, preventing and enforcing legal norms to protect and serve society; second, rehabilitating offenders through guidance to change their thoughts and behavior for the better; third, resolving conflicts arising from criminal acts through restitution and creating a sense of security among the community; and fourth, giving a deterrent effect to the offender. However, these punitive goals are not evident in the existing KUHP regulations concerning perpetrators. Therefore, society often takes matters into their own hands by applying customary sanctions rather than the existing legal sanctions. For example, in Minang customary law, there are two types of sanctions: first, exile from the community or banishment from customs; second, a fine of 100 sacks of cement.³³

Additionally, Article 284 paragraph 3 classifies adultery as a crime of complaint (*delik aduan*), meaning the criminal process cannot begin without a complaint from the harmed parties such as the husband or wife. This makes it difficult for parties outside the article to intervene in addressing the rising issue of adultery, which has become more widespread. This phenomenon forms the background for criminal law reform, caused by the incapacity of the old KUHP to adapt to contemporary developments. Regarding the criminal process for adultery classified as a crime of complaint, there are several procedures to be followed when filing a complaint with authorities: (1) Oral complaints, where the complaint is made verbally to the police and recorded by the officer; after recording, the complaint is signed by the complainant and the officer (investigator or detective). (2) Written complaints, regulated in Article 108 paragraphs 1 and 2 of the Criminal Procedure Code (KUHP), which states that anyone witnessing, experiencing, or observing an act suspected as a crime has the right to submit a written complaint to investigators (paragraph 1), and the complaint must be signed by the complainant; investigators or assisting investigators are required to provide a signature as proof of receipt (paragraph 2).³⁴

In accordance with Law No. 11 of 2012 concerning criminal law formation, Indonesia has also established a new Criminal Code (KUHP) that was officially enacted on December 2nd after the House of Representatives approved the draft. This new KUHP aims to replace the Dutch colonial-era criminal code that has been in force for nearly a century since 1918.

The new KUHP emerges as a comprehensive criminal law reform effort to prevent and address various crimes, both material (substantive) and formal (procedural). This

³² Ishak, "Teori-Teori Penghukuman Dalam Hukum Islam."

³³ Taufan Dirgahayu Kurnia and Erwin Syahrudin, "Konsep Tindak Pidana Zina Menurut Hukum Pidana Adat Dan KUHP Dalam Hukum Positif Di Indonesia," *Jurnal Pendidikan Dan Konseling (JPDK)* 4, no. 5 (September 2, 2022): 109–19, <https://doi.org/10.31004/jpdk.v4i5.6551>.

³⁴ Indonesia, Kitab Undang-Undang Hukum Acara Pidana (KUHP) No. 8 Tahun 1981, 34–35

reform is driven by legislative policy formulation, reflecting a broader effort to update and modernize the criminal justice system.³⁵

The concept of the draft KUHP (*Rancangan KUHP*) is viewed as a means of systematic overhaul in the criminal law system existing in the old KUHP and other laws outside the KUHP governing specific criminal acts.³⁶ The legal policy is part of the national legal policy and refers to official policies concerning law enforcement, whether in the form of creating new laws or replacing existing ones. According to Prof. Moh. Mahfud MD, legal policy involves official decisions on laws enacted, whether creating new laws or replacing old ones, aligning with societal values.³⁷ The purpose of criminal law reform, as cited by Barda Nawawi Arif in his book *Hukum Pidana* (Criminal Law), is to ensure that ideas and legislative provisions are rooted in philosophical, political, and socio-cultural values that are not reflected in the old Dutch-origin KUHP (WVS).³⁸

One notable result of this criminal law reform is found in Articles 411 to 413 of the new KUHP, which specifically criminalize adultery. Unlike the previous regulations, the new articles extend the scope beyond just married individuals to include adulterers who are unmarried, cohabitants or those living together, and non-consanguineous relationships. In Article 411, it states:

- 1) *Every person who engages in sexual intercourse with someone who is not his or her spouse shall be punished for adultery with a maximum imprisonment of 1 (one) year or a maximum fine in category II.*
- 2) *No prosecution shall be conducted for the crime as referred to in paragraph (1), except upon a report (complaint):*
 - a) *From the spouse or the person who is legally married.*
 - b) *From the parent or child of the person who is not in a marital relationship.*
- 3) *The complaint as referred to in paragraph (2) does not apply the provisions of Article 25, Article 26, and Article 30.*
- 4) *The complaint can be withdrawn as long as the court session's examination has not yet begun.*

Article 411 paragraph 1 of Law No. 1 of 2023 is the result of the criminalization of adultery. In addition to covering married offenders, the new KUHP also extends to include unmarried perpetrators. The presence of the new KUHP is expected to align with the nation's ideals. However, its implementation has sparked pro and con opinions among the community. The primary concern is that the sanctions are still relatively light—only

³⁵ Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (April 3, 2023): 190, <https://doi.org/10.1080/10383441.2023.2243772>.

³⁶ Muhammad Ramadhan and Dwi Oktafia Ariyanti, "Tujuan Pemidanaan Dalam Kebijakan Pada Pembaharuan Hukum Pidana Indonesia," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 5, no. 1 (March 30, 2023): 1–6, <https://doi.org/10.52005/rechten.v5i1.114>.

³⁷ Moh Mahfud MD, *Politik hukum di Indonesia* (Jakarta: Rajawali Pers, 2009).

³⁸ Ramadhan and Ariyanti, "Tujuan Pemidanaan Dalam Kebijakan Pada Pembaharuan Hukum Pidana Indonesia."

imposing a maximum imprisonment of 1 year. Such a short sentence is unlikely to serve as a deterrent effect on offenders and may allow repeat offenses (recidivism).

Furthermore, Article 411 paragraph 2 of the new KUHP still reflects Western ideological influence by classifying the crime as an absolute complaint (*delik aduan absolut*). As known, an absolute complaint crime (*delik aduan absolut*) differs from a relative complaint crime (*delik aduan relatif*). In the case of an absolute complaint, regardless of circumstances, the crime is considered a *delik aduan* and cannot be prosecuted unless a complaint is filed by the authorized party according to the law. Parties authorized to file such complaints include: (1) The spouse involved in the marriage. (2) The parent or child of the individual who is not in a marital relationship.

Based on the explanation above, the new KUHP still retains the concept of an absolute complaint crime in that article. As is known, an absolute complaint (*klach delikct*) differs from a relative complaint, in which in all circumstances, the crime remains an *aduanian delik*, and prosecution cannot occur without a complaint from the authorized party. This point is also clarified by Taufik Basari, a member of Commission III of the Indonesian DPR (House of Representatives), who explained that articles related to adultery and cohabitation in the new KUHP are classified as absolute complaint crimes. He stated that adultery is a domestic/private matter, not a public one.³⁹ This means that, both in the old and the new KUHP, efforts to eradicate adultery are not easy. Neither the government nor law enforcement officers or *Satuan Polisi Pamong Praja* (municipal civil service) and the entire society cannot simply raid young couples having sex—whether in hotels, boarding houses, or at the perpetrators' homes.

Differences in Adultery Provisions in Islamic Law and Positive Law

Cultural-nomenclatural differences and similarities form the basis of these two legal source systems. Islamic criminal law is derived from the Quran, Hadith, and the Ijtihad of scholars, which provide directives that are fixed and sacred. Meanwhile, Indonesian criminal law originates from Dutch colonial law, tailored to Indonesia's constitution and applicable legislation.⁴⁰ In terms of sanctions, Islamic law categorizes two types of adulterers: *muhson* (married) and *ghairu muhson* (unmarried). Each receives a different type of sanctions: the sanctions for *muhson* are stoning (being pelted with stones until death), while *ghairu muhson* are whipped 100 times and exiled for one year. Similarly, in positive law, there are differences: Law No. 1 of 1946, Article 284, prescribes a maximum imprisonment of 9 months, whereas Article 411 of Law No. 1 of 2023 prescribes a maximum imprisonment of 1 year. Furthermore, the system of proof in Islamic law involves several methods: first, using the testimony of four witnesses; second, confession (*ikrar*); third, observable pregnancy (*qorinah zuhur alhamli*). In contrast, both

³⁹ “DPR Tegaskan Pasal Zina Di KUHP Delik Aduan Absolut,” accessed May 1, 2025, <https://www.metrotvnews.com/play/NleC088Y-dpr-tegaskan-pasal-zina-di-kuhp-delik-aduan-absolut>.

⁴⁰ Sumardi Efendi, Khairil Akbar, and Muhadi Khalidi, “Exploring Criminal Punishments: A Comparative Review of Islamic and Indonesian Law,” *FUQAHA Journal of Islamic Law* 1, no. 1 (March 1, 2025): 13–22.

Law No. 1 of 1946 and Law No. 1 of 2023 in positive law use the concept of an absolute complaint (*delik aduan absolut*).

Below is a comparative table of regulations from the Islamic legal system and the positive legal system regarding criminal acts of adultery to make it easier to discuss the differences in sanctions between the two.

Table 1. Comparison of Regulations in the Criminal Law Systems

Islamic Law	Positive Law	
	Article 284 of the KUHP	Article 411 of the New KUHP
Islam criminalizes adulterers (muhsan) who are married, and (ghairu muhsan) who are still unmarried.	Article 284 paragraph 1 states that only perpetrators who are bound by marriage can be prosecuted.	Article 411 paragraph 1 states that both married and unmarried perpetrators can be prosecuted.
Proof can be obtained through the testimony of 4 witnesses and confessions (ikrar).	Proof is through an absolute complaint.	Proof is through an absolute complaint.
Complaints can be made by community members, parents, or the offender themselves.	Only the husband or wife can file the complaint.	The complaint can be filed by the husband, wife, parents, or their children.
The punishment for muhsan offenders is stoning with stones, while ghairu muhsan is whipped 100 times and exiled for one year.	The punishment is up to 9 months imprisonment.	The punishment is up to 1 year imprisonment.

Based on the table 1, there are differences and similarities between the legal systems. Articles 284 and 411 share a similarity in proof methods, both using *delik aduan* (complaint-based crime). There is no criminal act without a demand or complaint from the injured party. However, Article 411 of the new KUHP has expanded the scope of complaints, now including the husband or wife, parents, and children who are not in a marriage relationship. Previously, Article 284 of the KUHP only allowed complaints from the husband or wife who were married. In practice, parties outside of these provisions could not conduct prosecution.

In contrast, Islamic Law provides more freedom for anyone to file a complaint about a criminal act, as long as there are four witnesses. This can potentially improve legal efficiency in combating and reducing the impacts of adultery. From the table 1, it can be seen that the punishments in both Article 284 and Article 411 of the new KUHP are relatively light and unlikely to serve as an effective deterrent. Article 284 only imposes a maximum of 9 months imprisonment, while Article 411 prescribes up to 1 year. In contrast, Islamic Law is more strict in imposing sanctions on those who commit adultery. These sanctions are divided into two categories: *Muhsan* (those who are married) are sentenced to stoning, while *Ghairu Muhsan* (those who are unmarried) are whipped 100 times and exiled for one year.

In the author's view, to realize effective law enforcement, reforms and updates are needed to laws that currently lack deterrent effects. Therefore, the concept of Islamic Law can be integrated as an inspiration and solution to positive criminal law related to adultery, such as implementing sanctions like whipping, stoning, caning, diyat, and others.⁴¹

Integrity of Islamic Values in National Legal Reform

Observing the increasingly widespread development of zina, currently there are no legal instruments that are firm enough to prevent acts of zina in Indonesia. Nowadays, Indonesia's latest criminal law remains influenced by Western views in terms of legal logic, legal concepts, and legal theories.⁴²

As a predominantly Muslim country, it is expected that the values of Sharia law can be adopted nationally in legal development regulation through: 1) formulating Islamic law within the national law comprehensively, or 2) integrating law into national legislation based on Islamic legal principles. Broadly, the types of sanctions in Islamic criminal law include: First, hudud sanctions, which are fixed and non-varying punishments, such as death penalty, amputation of the hand, whipping, stoning, and exile. Second, *qisas* sanctions are punishments that can be changed and are reciprocal, such as death, injury, flogging, and compensatory punishment. Third, *ta'zir* punishments are flexible and can be adjusted, such as imprisonment, fines, whippings, dismissal, and others.⁴³

According to the author, they are interested in the implementation of whipping in Indonesia by including it as one of the main punishments in Article 66 of the new Criminal Code (KUHP). Legally, whipping has already been applied in Aceh through *Qanun Jinayat* No. 6 of 2014. Punishment by whipping (corporal punishment) is a type of physical punishment (bodily penalty) given to the convicted by lashing parts of their body. *Qanun* No. 6 of 2014 is a legal product at the regional regulation level that governs Islamic criminal law in Aceh. It covers several issues such as prohibition of alcohol (*khamar*), gambling (*maisir*), immoral acts (*khalwat*), zina, sexual harassment, rape, accusing someone of zina without presenting four witnesses (*qadsaf*), male homosexuality (*liwath*), and female same-sex relations (*musahaqah*). The Aceh *Jinayat Qanun* defines zina as sexual relations between a man and a woman outside of marriage; the punishment for zina offenders is 100 lashes regardless of *ghairu mushon* (not married) or *muhson* (married), as stipulated in Article 33 of the *Qanun Jinayat* No. 6 of 2014.⁴⁴

The implementation of whipping in Aceh has been controversial and linked to human rights violation issues. However, national legal regulation cannot resolve the

⁴¹ Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda*, 100.

⁴² Ida Wahyumah and Trias Saputra, "Comparative Analysis of the Crime of Overspel (Adultery) in the Articles of the New Criminal Code and the Old Criminal Code Related to Adultery," *Journal of Social Science* 5, no. 4 (July 25, 2024): 1034, <https://doi.org/10.46799/jss.v5i4.900>.

⁴³ Taufik Ismail Ramadhan and Deden Najmudin, "Sanksi Hukum Pidana Islam Terhadap Negara," *Jurnal Penelitian Multidisiplin Ilmu* 2, no. 4 (December 23, 2023): 2133–40.

⁴⁴ Nairazi Nairazi et al., "Fiqh dan Negara: Dinamika Penerapan Sanksi Hukuman Zina di Aceh," *Legalite : Jurnal Perundang Undangan dan Hukum Pidana Islam* 9, no. 1 (July 18, 2024): 77, <https://doi.org/10.32505/legalite.v9i1.8929>.

polemic surrounding zina. In terms of existence, the use of whipping has proven effective in preventing *khalwat* (zina). According to Acehnese society, whipping is an alternative punishment. The purpose of whipping, according to Islamic scholars, is to achieve the objectives of punishment in Islamic law, namely deterrence and reform.

From an effectiveness standpoint, whipping is considered more effective than death penalty, *qisas*, or stoning. In terms of prevention, whipping can address criminal acts. Besides physical impacts, whipping also has psychological effects. It not only causes pain but also shame for the offender and their family, serving as moral education or lesson for both the perpetrator and others in society to prevent future wrongdoing and to provide deterrence. Moreover, the implementation of whipping is practical, time-efficient, and inexpensive, contrasting with prison sentences which require more time and costs.⁴⁵ Whipping does not separate the offender from family, thus avoiding social issues like poverty, lack of education, and opportunities to remain with their family. After a short period, the convicted can reunite with their family. Therefore, whipping is argued not to oppose Human Rights (HAM). On the contrary, whipping is a very humane punishment, not painful, and does not cause social or economic problems during or after execution.⁴⁶

CONCLUSION

Zina is an act that violates religious, moral, and cultural values, requiring strict legal handling with a deterrent effect. Islamic law classifies offenders into *muhson* (married) and *ghairu muhson* (unmarried), with punishments such as stoning, flogging, and exile, reflecting firmness in maintaining social order. Conversely, the old and new Indonesian Criminal Codes (KUHP) are still not optimal in addressing zina due to their system of absolute complaint offences and relatively light sentences, making it difficult to prevent and prosecute perpetrators. This comparison shows that the Islamic legal system emphasizes moral protection and prevention, while positive law remains permissive. Therefore, integrating Islamic values into the national legal system is crucial to building a more just, dignified system that aligns with the nation's culture, while also strengthening efforts for prevention and law enforcement against zina.

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⁴⁵ Indra Suhardi, "Perlindungan Keluarga Terpidana Hukuman Cambuk dalam Qanun Aceh," *Media Syari'ah* 21, no. 1 (February 28, 2020): 13, <https://doi.org/10.22373/jms.v21i1.6047>.

⁴⁶ Suhardi, 14

- Zina.” *Tashdiq: Jurnal Kajian Agama Dan Dakwah* 1, no. 3 (December 24, 2023): 31–40. <https://doi.org/10.4236/tashdiq.v2i1.1514>.
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