

Adultery Articles in the Criminal Code Bill: Forms of Accommodation for the Development of National Law Against Islamic Values

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Economic and Social Development

44th International Scientific Conference on Economic and Social Development

Book of Proceedings

Editors:

Mila Nadrljanski, Jasmina Grzinic, Katarzyna Kinga Kowalczyk



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ADULTERY ARTICLES IN THE CRIMINAL CODE BILL: FORMS OF ACCOMMODATION FOR THE DEVELOPMENT OF NATIONAL LAW AGAINST ISLAMIC VALUES

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ABSTRACT

This paper aims to find out what values are protected in adultery articles in the Criminal Code Bill, to find out how forms of legal protection from adultery articles about protected values, and to know what Islamic values are accommodated in adultery articles. in the Criminal Code Bill. Philosophical, comparative and hermeneutic approaches are used to achieve the objectives in this study. Enforcement of the adultery article in the Criminal Code that has been ratified, still raises new crimes, because the values in the article of adultery in the Criminal Code do not match the values that live and apply in the community. This triggered the public to be vigilant. Enforcement of Article 284 in the Criminal Code is considered unable to resolve the problem of adultery in Indonesia. Based on this, the adultery article needs to be reconstructed. The current Criminal Code Bill in the House of Representatives is a form of development of national law, which has been sought by the Indonesian people so that the law is in accordance with the values of the Indonesian nation, because effective law is a reflection of the values of the nation. Likewise, the adultery article in the Criminal Code Bill should be in accordance with the values that live in Indonesian society. Adultery articles in the Criminal Code Bill are implicitly a form of protection for marital institutions, social honor and sexual morality values. Protection of these values includes the determination of adultery as an ordinary violation, not complaint offense and a disadvantaged third party can report, besides that the adulterer is anyone who has sexual relations without a legal marriage. Values in adultery articles in accordance with Islamic values, Islam glorifies the institution of marriage, upholds one's honor based on behavior and maintains social morality in society.

Keywords: Adultery, Islamic Values, The Criminal Code Bill, Development Of National Law

1. BACKGROUND

The Criminal Code is still the main source of reference in criminal law. The Criminal Code consists of three books, book I contains general rules, book II contains criminal acts, and book III contains criminal acts related to violations. Although the Criminal Code is the main source, there are several criminal acts that are further regulated in separate laws. This condition is quite alarming considering the Criminal Code is a translation of the Dutch Criminal Code (WvSvNI) which then through Law Number 1 of 1946 was changed to WVS which was translated by the Criminal Code. the validity of WVS is temporary, but until the country is 74 years old, the Criminal Code is still in used. The Criminal Code currently in force still raises problems that are often criminogenic, because several articles in the Criminal Code are not effective in dealing with criminal acts. The ineffectiveness of the article is because the values that animate the articles in the Criminal Code are derived from Dutch values that are incompatible with the values of the Indonesian people. As time goes by, science and technology also influence the development of criminal acts which cannot be accommodated by the Criminal Code articles. Based on various considerations, the Criminal Code must be updated immediately. Referring to this, the presence of the Criminal Code Bill is a breath of fresh air for Indonesian law. However, in the process of ratifying the Draft KUHP into a national KUHP it is not easy. The existence of articles of the tug of war from the various parties or certain groups becomes the

main background of the difficulty of ratification of the Criminal Code. One of the articles that raises polemics is adultery article. There are those who agree with the existence of the article, but there are also those who oppose the article. Each party has an opinion that underlies his attitude. The emergence of the polemic needs to be reviewed to provide input in the reconstruction of the adultery article in the Criminal Code Bill, so that the ratification process of the Criminal Code Bill is not hampered. To facilitate the review of adultery articles in the Criminal Code Bill, it is necessary to study the values protected in the Adultery Article in the Criminal Code Bill, the forms of protection of protected values, and whether the protected values are in accordance with the values in Indonesian society, especially Islamic values because the majority of the Indonesian people are Muslim. A philosophical juridical approach is used in this study.

2. DISCUSSION

2.1. The values protected in the adultery article in the Criminal Code Bill

To be able to discuss the values protected by the adultery article in the Criminal Code Bill, the contents of the article of adultery, which is regulated in Article 484, are as follows:

1. Sentenced for adultery, with a maximum of 2 (two) years in prison:
 - a) A man who is in a marital relationship with a woman who is not his wife;
 - b) Women who are in a marital relationship make love with men who are not their husbands;
 - c) Men who are not in marriage bond with women, even though it is known that these women are in a marital bond;
 - d) Women who are not in a marital relationship make love with men, even though it is known that these men are in a marital bond;
 - e) Men and women who are not married each other make intercourse.
2. The criminal acts as referred to in paragraph (1) cannot be prosecuted except for complaints of husband, wife, parents, or children.
3. Complaints as referred to in paragraph (2) do not apply to the provisions of article 26, article 27, and article 31.
4. Complaints can be revoked as long as the trial at the trial has not yet begun.

Based on Article 484 of the Criminal Code Bill, it can be seen that the values protected in the article are:

- Marriage institution
Basically, article 484 of the Criminal Code Bill states that people who make love with people who are not legal partners are called adultery. The rules show that to have an intimate relationship with people who are authorized by the institution of marriage, so that if the institution of marriage is ignored, it is said to have committed adultery. Article 484 of the Criminal Code Bill has extended the limits of adultery when compared to Article 284 of the Criminal Code. In this case it can be said that the drafters of the Criminal Code Bill have criminalized. Article 484 of the Criminal Code Bill has extended adultery limits when compared to Article 284 of the Criminal Code. In the formation of a regulation, criminalization is very possible based on the existing signs. According to Sudarto¹,

¹ Sudarto, *Law and Legal Criminal Law*, Bandung: Alumni 1981, p.44-48. that the grid for criminalization is as follows:

- a. The use of criminal law must pay attention to national development goals, namely to create a just and materially and spiritually prosperous just society based on Pancasila; in connection with this matter, (the use of) criminal law aims to overcome crime and make a suspension of the countermeasures itself, for the sake of welfare and protection of the community.
- b. Acts that are attempted to be prevented or overcome with criminal law must be "undesirable actions", namely acts that bring harm (material and / or spiritual) to the citizens of the community.
- c. The use of criminal law must also take into account the principle of "cost and results" (*cost and benefit principle*).

criminalization must pay attention to several lattices or marks. Criminalized actions must be undesirable actions by the community that bring material and spiritual losses. Extension of adultery refers to sexual relations without a legal marriage. The criterion for this action is a form of free sex which is not desired by Indonesians because the losses incurred are not only material but also huge losses on the moral (spiritual) side². Material loss includes adultery, which is one of the factors causing divorce. In terms of spirituality, the losses incurred include making the household not harmonious, eliminating confidence in someone, making someone a social person and the biggest impact is the moral degradation of the nation.

- Social moral value

Basically, In Article 484 of the Criminal Code Bill, stated that anyone who is not married is engaged in sexual relations with the same person who is not married legally to have sex is called adultery. This means that the moral value of the community is protected in these rules. The formation of moral values of life in Indonesian society states that people who engage in relationships without marriage have committed adultery and have damaged the moral order of society. Based on this, the preparation of the Adultery Article in the Criminal Code Bill, the issue of propriety in the community and the values that guide community life should be used as a benchmark for criminalization by still having to pay attention to the signs that are used as the basis for criminalization. Sudarto also explained that the measure to criminalize an act depends on the values and collective views contained in the community about what is good, what is right, what is useful or vice versa. It can be said that the views of society and religion about decency are very influential in the formation of laws, especially criminal law³. Opinion Paul Vinogradoff quoted by Suteki⁴ said that in fact the law grew out of the practices carried out by community members in establishing relationships between one person and another. Starting from this opinion and in relation to legal politics in the stage of legal formation, the actions of the community in completing acts of adultery based on customary values and religious values should be institutionalized in a form of formal law.

- Protecting the interests of victims

The formulation of infidelity violations in Article 484 of the Criminal Code Bill pays more attention to the interests of the victims when compared to Article 284 of the Criminal Code. As can be seen in the formulation of sanctions in the form of a maximum prison sentence of two years. The principle of balance between the interests of the perpetrators and the interests of the victims has been tried to be considered in Article 484 of the Criminal Code Bill with the severity of criminal sanctions which were initially only oriented towards the interests of the perpetrators, have begun to shift in relation to the interests / whereabouts of the victims. The Criminal Code Bill can also be known by changing the type of violation, which was originally (Article 284 of the Criminal Code) as a complaint of violations into ordinary violations. Changes in the types of violations also accommodate the values of Indonesian society in viewing the institution of marriage. In this case, the living value in Indonesian society is that marriage is not just an individual problem. Therefore, if there are parties who damage / tarnish the institution of marriage, the parties involved can fight for the protection of victims.

d. The use of criminal law must also pay attention to the capacity or capability of the work force of law enforcement agencies, that is, there must be no oversight of duties (*overbelastingi*).

² Barda Nawawi Arief, *May Crime Between the Development of Cyber Crime Studies in Indonesia*, Jakarta: PT. Rajagrafindo Persada, 2006 p.181.

³ Sudarto, *Criminal Law and Community Development Study of Criminal Law Renewal*, Bandung: Sinar Baru, 1983, p. 67.

⁴ Suteki, *Legal Design in the Social Room*, Semarang: Thafa Media, 2013, p.83

- Pedigree/nasab of children
Prohibition of intercourse with any person and only allows intercourse only with a legitimate partner will keep the child nasab. This is because it will be known from the seeds of who a child is born. The childbirth is very important because it is related to who can be a guardian of marriage or inheritance rights.
- Health
Another value protected in Article 484 of the Criminal Code Bill is protection of health. Sexual intercourse with people who are not legitimate partners is a form of free sex. One of the dangerous effects that arise for the perpetrators is the emergence of difficult venereal disease and even no cure for threatening reproductive health. Besides that free sex is one of the causes of HIV disease that attacks a person's immune system and this disease has not found a cure. Prohibition of committing adultery on everyone, both those who are bound by marriage and those who have not at all intended to have sexual relations only with their legal partners, so that health can be more monitored and maintained.

3. FORMS OF PROTECTION IN THE CRIMINAL CODE BILL IS :

3.1. Expansion of adultery criteria

The provisions in Article 284 of the Criminal Code both directly and indirectly provide opportunities for men and women who have not been married to have sexual relations without a legal marriage. In contrast to Article 484 of the Criminal Code Bill, with the extension of adultery criteria, namely that sexual relations carried out by men and women who are not legally bound by marriage with others is a criminal act (adultery) so that violations of these provisions can be criminal. The expansion of adultery criteria / limitations shows that protected by Article 484 of the Criminal Code Draft is not only a marriage institution but also a social moral value of the community

3.2. Adultery is used as an ordinary offense not an offense of complaint

Adultery criteria in Article 284 of the Criminal Code require a marriage bond for both the perpetrator or one of the perpetrators. This can be explained by understanding the relationship between religion and state in the Netherlands. The Netherlands is a secular state that does not interfere with the existence of religion, including not interfering with the behavior of its citizens, whether or not they adhere to religious norms. Secularism argues that the positive law in force is a law derived from human agreement through social contracts that are not bound at all to religious law⁵. Quoting Sajipto Rahardjo's⁶ opinion that the actions taken by the wider community against adultery are a form of society writing a legal text that completing adultery does not have to wait for complaints from husband / wife as victims. So when Article 484 of the Criminal Code Bill makes adultery offenses as an ordinary offense only copy the text that has been written by all Indonesia during this time. Still according to Sajipto Rahardjo⁷, who quoted Chamblis's opinion that Article 284 of the Criminal Code is a Dormancy Statutory or legal phenomenon that sleeps / is put to sleep, namely a law that is still valid but not used by the people. This can be seen rarely used Article 284 of the Criminal Code in resolving adultery offenses. Article 484 of the Criminal Code Bill is part of the development of national law (building and overhauling Indonesian law) which in its implementation uses an approach

⁵ A. Ubaidillah and Abdul Rozak, *Democracy, Human Right and Civil Society*, Jakarta: ICCE UIN Syarif Hidayatullah Jakarta, 2006, p. 40

⁶ Sajipto Rahardjo, *Law and Behavior*, Jakarta: Kompas, 2009, p. 21

⁷ Sajipto Rahardjo, *Ibid*, 2009, p. 21

oriented to human values, cultural identity values, and religious moral values that live in society or can be said by using a humanist, religious and cultural approach⁸.

3.3. Sanctions for adultery offenses become more severe

Sanctions for adulterers in Article 284 of the Criminal Code are a maximum of 9 months in prison. The lightness of adultery sanctions in Article 284 makes the values to be protected by the article unable to be protected, because light sanctions do not deter even they can harm the victim. Based on this, in Article 484 of the Criminal Code Draft adultery sanctions are more aggravated with a maximum penalty of 2 years in prison. The increase in sanctions is expected to prevent acts of adultery and deter the perpetrators of acts of adultery. Implicitly with more severe sanctions, it is expected that the values to be protected can be truly protected. According to Wirjono Projodikoro, it can be said that the existence of crime is a means of psychology, which means that with this criminal threat, people are pushed psychologically not physically, not to commit crime⁹. The living value in Indonesian society about the institution of marriage is protected in Article 484 of the Criminal Code Bill by making adultery offenses as ordinary offenses not offenses. It can be seen that in Article 484 of the Criminal Code Bill that can report adultery is not only the husband or wife of the adulterer.

4. CONFORMITY OF ADULTERY ARTICLE IN THE CRIMINAL CODE BILL WITH ISLAMIC VALUES IN INDONESIAN SOCIETY

In Islam sexual relation must be in a legitimate marriage. In Islam, marriage is a sacred bond (mistaqan ghalidan)¹⁰, therefore in protecting the sanctity of marriage in Islam the pillars of marriage are regulated. If the pillars of marriage are not fulfilled, the marriage is not valid. Islam places marriage as the backbone of family life. Whereas family is the foundation of society and is one form of worship for Muslims. Regarding the sanctity of marriage, in Muslim societies the choice of a spouse involves the whole family. Marriage in Islam is not only a bond between individuals but a bond between extended families. In Article 484 of the Criminal Code Bill in accordance with Islamic values that are prohibited from engaging in legal sexual relations outside of marriage for people who are married or not married. To be able to have sexual relations must be done in a legal marriage. Regarding the sanctity of marriage, in Muslim societies the choice of a spouse involves the whole family. Marriage in Islam is not only a bond between individuals but a bond between extended families. That is why Islam upholds marriage, because marriage is a sacred thing, sacred and contains a contract that is not only binding between two people (male and female only), but also binding kinship which later aims to build a new family with the hope of the household ideal *sakinah mawaddah and rahmah* as in the Word of Allah SWT letter ar-Rum verse 21. In addition, one of the purposes of marriage in Indonesian society is to maintain good relations between groups of relatives or family in the broadest sense¹¹. Based on this, if there is a damage to the marriage institution, the injured party is not only a married couple, but the entire family. That is, those who act to guard the marriage institution not only husband and wife but also their families.

⁸ Satjipto Rahardjo, *Building and Remodeling Indonesian Law A Cross-Discipline Approach*, Yogyakarta: Genta Publishing, 2009, p. XV

⁹ Wirjono Projodikoro, *Criminal Law Principle in Indonesia*, Bandung: Eresco, 1986, p. 23

¹⁰ Abu rohmah, *Maintaining Ethics and Norm of Marriage*, in Suara Merdeka, Tuesday 4 December 2012, p. 6

¹¹ The public's understanding of marriage is in accordance with what was stated by Gautama, S. *Aspects of Mixed Marriage Law (Staatblad 1898 No. 158)*, Bandung: PT. Citra Aditya Bakti, 1996, p. 172. Likewise with the opinion of Soerojo Wignjodipoero. *Introduction and Principles of Customary Law*, Jakarta : PT. Gunung Agung, 1968, p. 122-149. Marriage is a very important event in the livelihoods of the Indonesian people because marriage does not only concern women and men, but also the parents of both parties, their siblings, and even their families. Even in customary law, marriage is not only an important event for those who are still alive, but marriage is also an important event for those who are still alive but it is also a very meaningful event and that is fully received attention and followed by the spirits of the ancestors both sides. Marriage aims to obtain offspring and aims to be able to live together in a community in a family relationship.

This is in accordance with Article 484 of the Criminal Code Bill that can report the occurrence of adultery (adultery is one of the acts that tarnish the sanctity of marriage institutions) not only the husband or wife of the perpetrator. In other languages, making adultery as an ordinary offense is not an offense of complaint is in accordance with Islamic values. In Islamic law the form of adultery is divided into two, First, namely adultery *ghoiru muhson* which means intercourse between unmarried adults. Second, namely adultery *muhson*, which means intercourse is carried out by men with women who are not husband and wife and one or both of them are married in marriage with another husband / wife¹². The existence of two types of adultery in Islamic law shows that every sexual intercourse committed outside a legal marriage is adultery. Sanctions for adultery in Islam are very severe (in the Qur'an letter an-Nur verse 2 it is stated that severe sanctions for men and women who commit adultery, which are harassed by each perpetrator as much as 100 times are harassed and witnessed before many people)¹³. In the hadith of the prophet Muhammad, it was explained that the punishment for adulterers who had been married, whether male or female if there was tangible evidence and / he had been pregnant or his own confession was stoning. The adulterer who had never married the Prophet sentenced him to 100 lashes and exiled for a year. Form sanctions stoning closer to the theory of retaliation. While sanctions of deterrence and exile are closer to the combined theory, besides being given sanctions with the aim of retaliation, there is also a purpose so that adulterers become deterrent not to repeat again¹⁴. Islam provides severe sanctions for zina perpetrators. In addition to physical punishment, Islam also provides moral and social sanctions in the form of the announcement of its disgrace, being exiled (*Taghrib*), not being allowed to marry and being rejected. this is more so that the perpetrators of zina. Sanksi is so heavy for adulterers because Islam believes that the impact of adultery is very dangerous for human life, both in the context of the lives of individuals, families (child status) and society. Islam upholds marriage (in the Qur'an the letter ar-Ruum verse 21 mentioned part of the power of God which is to create wives of your own kind to feel calm and full of affection). For this reason marriage is worth worship because it is not only to channel each other's passions but also to build a harmonious and loving family rather than committing adultery¹⁵. Nasab child is very important (in the Qur'an the letter al-Ahzab verse 5 mentioned that calling a child by including the nasab of his father is still required to safeguard the rights, guarding the psyche of the child because after all the child is born in a sacred state due to people's mistakes his parents, in the Islamic view also obliged to make the child's birth certificate). The values in the article 484 of the Criminal Code Bill are in accordance with the values that live in Indonesian society especially in accordance with Islamic values.¹⁶

5. CONCLUSION

Based on the result of the study of the contents of Article 484 of the Criminal Code Bill by comparing the contents of article 284 of the Criminal Code, it can be concluded that the values protected by Article 484 of the Criminal Code Bill which are not protected by Article 284 of the Criminal Code included the protection of marriages from defilements, social moral, more attention is given to the sense of justice for the victims, guarded by the health of the children and the health of free sex. The form of protection provided by Article 484 of the Criminal Code Bill on protected values on interest is the expansion of adultery superiors, the making of adultery as an ordinary offense, the severity of sanctions. As for compability between Article 484 of the Criminal Code Bill with Islamic values, among others, that in Islam, intercourse can

¹² Oemar Seno Adji, *Criminal Law (Procedur) in Prospection*, Jakarta: Erlangga cet 2nd, 1986, p. 49-51

¹³ Al-Qur'an, Departemen Agama RI, Depok: Al-Hudd, 2016, p. 351

¹⁴ H. Ahmad Wardi Muslich, *Introduction to and Principles of Islamic Criminal Law*, Jakarta: Sianr Grafika, 2006. Cet. II. p. 17

¹⁵ Al-Qur'an, Departemen Agama RI, Depok: Al-Hudd, 2016, p. 407

¹⁶ Al-Qur'an, Departemen Agama RI, Depok: Al-Hudd, p. 419

only be done in a legitimate marriage, meaning that Islam prohibits free sex. In Islamic law the form of adultery is divided into two, First, namely adultery ghoiru muhson which means intercourse between unmarried adults. Second, namely adultery muhson, which means intercourse is carried out by men with women who are not husband and wife and one or both of them and married in marriage with another husband/wife. The existence of two types of adultery in Islamic law shows that every sexual intercourse committed outside a legal marriage is adultery. This is in accordance with what is stipulated in Article 484 of the Criminal Code Bill. In Islamic law the sanction of adultery is very heavy because adultery is included in the category of great sin. Therefore, if Article 484 of the Criminal Code Draft adultery sanctions are more severe than those in Article 284 of the Criminal Code, it can be said Article 484 of the Criminal Code Bill is in accordance with the rules in Islamic Law.

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