

ANALYSIS OF ISLAMIC LAW AND POSITIVE LAW ON MARRIAGE DUE TO VIOLATION OF MORAL NORMS

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Abstract

Violations of moral norms often have significant social impacts, one of which is marriage which is carried out as a form of resolving moral conflicts in society. This article aims to analyze marriage due to violations of moral norms in Pematang Siantar City based on the perspective of Islamic law and positive law in Indonesia. In Islamic law, marriage is often considered a solution to normalize social relations after the occurrence of a violation, although there are requirements and principles that must be met. Meanwhile, positive law in Indonesia emphasizes the formal legality aspect and does not explicitly regulate the obligation to marry in such situations. This study also discusses various social implications that arise as a result of this phenomenon, such as social pressure on the individuals involved, as well as its impact on household stability. Using a normative-juridical approach, this article reviews how the two legal systems view this phenomenon, as well as providing an overview of the integration efforts between religious, legal, and cultural values in resolving this problem. The results of the analysis show that a comprehensive approach is needed to handle marriage cases due to violations of moral norms, in order to ensure justice for all parties involved.

Keywords: Violation of Moral Norms, Marriage, Islamic Law, Positive Law

INTRODUCTION

As a sharia that accommodates human needs, Islam welcomes and encourages marriage as a law that applies to men and women. Apart from that, marriage also plays a role as a means of actualizing the benefits of the biological needs of every human being. This is in accordance with the definition of marriage put forward by Imam Shafii as a "contract by which sexual relations between a man and a woman become halal". Because marriage is a contract that aims to carry out a halal bond, a bond that *Sakinah mawaddah warahmah* will be formed.

Nikah according to language has its true meaning (*haqiqat*) and artifact (*majas*). The true meaning of nikah is "*al-dammu*" which means to squeeze, overlap or gather. While the metaphorical meaning of marriage is "*wati*" which means body or aqad which means to make a marriage agreement. In the matter of marriage, jurists interpret marriage according to the metaphor (Kamal. M, 1993: 1).

Some writers also sometimes refer to marriage as the word marriage, which according to the language, means to form a family with the opposite sex, to have sexual relations or to have sex, the term "marriage" is used generally, for plants, animals, and humans, and indicates a naturally generative process (At. Timahi, Sohari. S, 2008: 7).

It is explained that the word nikah contains three kinds of meanings, namely, the first meaning according to language, and the second according to Ushul experts. First: the meaning of nikah according to the language is gathering or oppressing (the meaning of oppression in the Indonesian dictionary is *mendih*). Second: the meaning of marriage according to ushul experts, there are three kinds of opinions: The first opinion, nikah according to its original meaning is one body and according to the meaning of *majazi* (metaphoric) is aqad with which it becomes halal sexual relations between men and women. This is according to the Hanafi group of ushul experts. The second opinion is that marriage is originally aqad which is halal sexual relations between men and women, while according to the meaning of *majazi* is copulation. This is according to the ushul experts of the Shafi'i group. The third opinion is that marriage, company means between aqad and intercourse. This is according to Abul-Qasim Azzadjudad, Imam Yahya, Ibn Hazm and some of the Ushul Scholars from Abu Hanifah's companions (Ibrahim. H, 1971: 65).

Meanwhile, the definition of marriage in Law No. 1 of 1974 article 1 states that marriage is an innate bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the One Godhead.

In addition, Marriage as a *sunnatullah* that applies to all mankind in order to continue their lives and to obtain offspring, Islam strongly encourages marriage. This recommendation is expressed in various expressions contained in the Qur'an and Hadith. This is in accordance with article 2 of the Compilation of Islamic Law that marriage according to Islamic law is a marriage, which is a strong contract or *miitsaaqan ghaliidhan* to obey Allah's commands and to do so is worship. Marriage aims to create a household life that is *sakinah mawaddah* and *Rahmah* (Ahmad. A.B, 2002: 9).

An agreement in marriage is not just an agreement, this means that the agreement in marriage is not the same as an agreement in general, for example in a lease, exchange, and sale and lease agreement, where each party is free to enter into an agreement to determine the content of the agreement (Al Khatib. Al S: 37). Thus, an agreement in marriage is an agreement where the content of the agreement must be in accordance with the provisions in the applicable marriage law, therefore the provisions on the content of the agreement already exist in advance, so that a man and a woman agree to perform a marriage with each other. This means that they have really agreed to obey the applicable provisions regarding the rights and obligations of each party during and after living together as well as regarding the marital status, the position of their descendants.

Marriage is one of the main principles of life in community association. Marriage is not only a noble way to regulate human life in marriage and maintain offspring, but marriage can be seen as a way to the door of happiness, blessings, harmony, and closeness between one race and another. In general, it can be found that the wisdom of the sharia of marriage is as follows (Al Hamdani, 2002: 108): 1) Marriage is the best way to meet sexual needs; 2) Marriage is the best way to glorify children, multiply offspring, preserve human life, and maintain *nasab*; 3) Marriage fosters the instinct of fatherhood and motherhood which also fosters feelings of love and affection; 4) Marriage causes a diligent and earnest attitude in working because of a sense of responsibility for his family; 5) Marriage will strengthen family ties based on mutual love as a capital for a safe and prosperous community life.

There is a tradition born from the thinking of the community, where they punish the perpetrators of violations of moral norms in the form of dating, with the aim that this marriage becomes a form of responsibility for both couples, to maintain the good name and also to be a punishment and consequence of the act of having sex before marriage. The consequence referred to in this discussion is a demand for accountability for the actions taken before, this happens when a person thinks that when a man and a woman are dating, they should be married only, or the act of courtship indicates that they will or should get married.

Looking at the benefits above, it can be understood that actually, this marriage contains an element of goodness for couples who violate moral norms. However, in the positive law, marriage is not only carried out based on its purpose but must be considered for its conditions. The conditions for marriage according to positive law, namely according to the Republic of Indonesia Law Number 1 of 1974 concerning Marriage which discusses the conditions of marriage, namely in Articles 6 and 7 of the Conditions of Marriage Article 6 (Rizky Perdana Kiay. D, 2018): 1) The marriage must be based on the consent of both prospective brides; 2) To carry out a marriage, a person who has not reached the age of 21 (twenty-one) years must obtain the permission of both parents; 3) If one of the parents has passed away or is unable to express his will, then the permission referred to in paragraph (2) of this article is sufficient to be obtained from the surviving parent or from the parent who is able to express his will; 4) If both parents have passed away or are unable to declare their will, permission is obtained from the guardian, the caretaker, or the family who has blood relations in the straight line upwards as long as they are alive and in a state of being able to declare their will; 5) If there is a difference of opinion between the persons mentioned in paragraphs (2), (3), and (4) of this article, or one or more of them does not express their opinion, then the Court in the jurisdiction of the person who is going to perform the marriage at the request of the person may grant permission after first hearing the persons mentioned in paragraph (2). (3) and (4) of this article; 6) The provisions paragraphs (1) to (5) of this article apply as long as the law of each religion and its beliefs from the person concerned does not specify otherwise.

REVIEW OF LITERATURE

Significance of Legal Protection

Rape in the criminal law regime (*strafrecht*) is a crime of morality (*misdrifven tegen de zeden*), as stated in Book II of the Code Criminal Law (KUHP), especially the provisions of Article 285. Article 285 of the Criminal Code regulates the crime of rape (*verkrachting*) which is formulated as follows: Any person who, by force or with the threat of using force, forces a woman to have sexual relations outside of marriage with him, because he is guilty of committing rape shall be punished by imprisonment. for twelve years. According to the formula of Article 285 of the Criminal Code, it is also clear that rape is an act of violence committed against a woman outside of marriage with the perpetrator. In the provisions of Article 285 above, there are elements to prove whether or not the crime of rape, the elements referred to are as follows (Saputra, Y. 2021): 1) There is violence or threats of violence; 2. Forcing a woman; 3. Having sex outside of marriage (*buiten echt*) with him (the perpetrator/dader).

Recommendations For Carrying Out Marriages in Islam

The recommendation for marriage in Islam is of course to avoid acts of adultery or acts that exceed the limits and violate the norms and rules that exist and apply in society and religion. 4 Recommendations for immediate action Marriage is not just a recommendation, however, if Indonesian young women are still under the age (based on the law) to enter into marriage, this is different from Islamic teachings that for them having reached puberty (adulthood) is sufficient as a condition for the ability to enter into marriage for men and women. Marriage dispensation is not a violation because a person's age is small (based on statutory provisions), b but because of the readiness of the man and woman who want to get married (Novitalia, 2023).

RESEARCH METHOD

This research is descriptive-qualitative because this research is considered capable of analyzing social reality in detail. Research is a process of collecting, processing, and analyzing an event. To obtain scientifically accountable studies (Muleong, Lexy, 2002: 53). So, the data collection methods used in preparing this research with documentation, this

method were used as an effort to obtain secondary data about the Samosir community. The data collection process involves collecting documents, both written documents, image documents, and work results. With this documentation method, it can be used as additional data that already exists and as evidence and data reinforcement.

RESULTS AND DISCUSSION

Marriage of a couple who violates moral norms in Islamic Law and KHI

In Islamic Law, the punishment for adultery can only be determined if the elements of adultery meet several criteria.

1. Sex outside of marriage is carried out legally and deliberately (Citra Effhar, 1993: 568). Having intercourse is considered adultery at least while dipping the *hasyafah* (scrotum) into the *farj*, even if there is no erection. Furthermore, the perpetrators also knew that their intercourse was haram. Adultery requires the existence of intentional or unlawful purposes in the adultery of men and women. The intention to violate the provisions of the law is considered fulfilled if the perpetrator knows that he is having sex with a woman who is haram for him. Even if the adulterer's wife submits and knows that the person who has sex with her is not halal to her (Abdul Qadir. A, 2007: 154).
2. The perpetrator of the act of adultery is a person who has reached the age and limit of *mukallaf*. Islam stipulates that the punishment of hudud can be imposed on every *mukallaf* if it is proven to have committed adultery, both married and single. If a child or a crazy person has sex outside of marriage, it is not adultery according to Sharia law, and if it is committed by a fool, the paramedic admits it is wrong (Hartono, 2015).
3. Adultery is a sexual relationship that is carried out consciously and without coercion, meaning that the perpetrator agrees to carry out the marriage without coercion. Forced sex is rape. If one of the parties is obligated, then he is not the perpetrator, but the victim. In the rape case, the perpetrator was still sentenced to *had*, but the victim did not.
4. There are signs (*qarinah*) of the act of adultery. Three evidences can be relied on in proving acts of violation of immoral norms such as adultery, namely:
 - a) Witnesses The scholars agreed that adultery could not be proven without four witnesses. This is the agreement of the scholars. The witness of adultery must be four

men, mature, intelligent, hifzūn (able to remember), speak, see, pious, and Muslim; Therefore, if an act of adultery is to be proven by witnesses who are less than four people, or who do not meet the requirements of one of the above conditions, their testimony will not be accepted, and the act of violating moral norms in the form of adultery cannot be proven (Halimatun, 1970: 399).

b) There is a confession, Imam Malik and Imam Shafi'i believe that one confession is enough to impose punishment. This is the same as the opinion of Ibn Dawud, Abu Šaur, al-Ṭabari who expressed this opinion. However, other tones of opinion, such as Imam Abu Hanifah and his followers such as Imam Ibn Abi Lala, Imam Amad, and Ishaq believe that infidelity can only be punished if four confessions are found in a row in different places (Ahmad Sudirman).

c) Qarinah (evidence), a woman's pregnancy is subject to ḥad punishment if she does not have a husband or owner (such as a slave of Sahaya, then she must have a master who is thought to be the cause of her pregnancy). (Halimatun, 1970: 3990).

Consent and guardianship issues are important in marriage. Concerning *ijbar* and validity in marriage, it is explained in Article 19 of the KHI that "the guardian of marriage is a pillar that must be fulfilled for the bride-to-be who acts to marry her", as well as Article 6 paragraph 1 of law Number 1 of 1974 concerning Marriage junto article 16 paragraph 1 of the Compilation of Islamic Law states that "marriage must be based on the consent of the two prospective brides", Article 17 paragraph (2) of the KHI states that "if it turns out that the marriage is not approved by one of the prospective brides, the marriage cannot be held, and in article 71 letter f of the KHI it is stated that "a marriage can be annulled if the marriage is carried out by force"

The legal basis related to the law of marriage of adulterous women as stated in the Qur'an surah an-Nur [24]: 3, which reads:

الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ

A man who commits adultery does not marry but a woman who commits adultery, or a polytheistic woman; and a woman who commits adultery is not married but by an adulterous man or a polytheistic man, and such is forbidden for believers (Q.S. An-Nur [24]: 3).

According to Sayyid Sabiq, it is permissible to marry an adulterous woman with the note that they must repent first, if the adulterous man and woman have repented earnestly, ask Allah for forgiveness, repent, cleanse themselves from sin and start with a clean life and abstain from sin, then Allah accepts their repentance and includes them with His mercy in His good servants (Sayyid. S, 1980: 145).

The Hanafi, Shafi'i and Maliki groups say that it is permissible for an adulterous man to marry an adulterous woman and vice versa, an adulterous woman may marry an adulterous man. So according to them, adultery does not prevent the validity of *aqad nikah* (marriage). In addition, Abu Hanifah and Imam Shafi'i related to the time of iddah, arguing that it is permissible to marry an adulterous woman without waiting for the expiration of iddah, and also Imam Shafi'i allows marrying an adulterous woman even during pregnancy because this kind of pregnancy does not cause it to be unlawful to marry.

Imam Hanafi and Imam Shafi'i said that a woman who becomes pregnant due to adultery may marry the man who impregnated her or another man. As Imam Hanafi said as follows: "A woman who is pregnant because of adultery has no iddah, and it is even permissible to marry her, but it is not permissible to have sex until she gives birth to her womb". Imam Shafi'i said: "Sex because of adultery has no iddah, women who are pregnant because of adultery are allowed to marry, and it is permissible to have sex even if they are pregnant." According to them, the adulterous woman is not subject to the provisions of the marriage law as stipulated in the marriage. Because iddah is only determined to respect the sperm in the wife's womb in a valid marriage. Sperm resulting from sex outside of marriage is not prescribed by law. They reasoned with the Qur'an in surah An-Nur verse 3 "Men who commit adultery do not marry but women who are tame, or polytheistic women; And the woman who commits adultery is not married but by the man who commits adultery or the polytheistic man".

According to Imam Hanafi, although a pregnant woman's marriage can be carried out with a man, she should not be, so that the baby in the womb is born. This is based on the words of the Prophet Muhammad PBUH which means: Do not have sex with a pregnant woman until she gives birth. According to Imam Shafi'i, the marriage of a pregnant woman can take place, it can also have intercourse with her, this is based on the words of the Prophet

Muhammad PBUH which means She has friendship with what she has taken from her vagina, and the boy is your slave

"For him, his wife, because you have asked for his halalness to collect it, while the child is a servant to you" (Tajuddin. A, 1998: 328).

Paying attention to Imam Shafi'i, a woman becomes pregnant because of the result of having sex outside of marriage if she marries a man, then the pregnancy does not affect her marriage. If you pay attention to the opinion of Imam Hanafi, although it is permissible for a pregnant woman to marry a man, she is forbidden to have sexual intercourse. The prohibition of a pregnant woman from having sexual relations with a man who marries her means that her pregnancy affects the continuity of her domestic life, as is the case with a married person.

From the above explanation, it can be seen that according to the opinion of Hanafiyah and Shafi'iyah, a woman who is pregnant due to adultery is allowed to carry out marriage, it is permissible to be married to the man who is pregnant with her or with another man as long as she has a desire. In the view of the two madhhabs, the result of the act of adultery, namely the pregnancy of a woman, is not related to the legal provisions contained in the marriage issue, as well as the issue of iddah, where according to the two madhhabs it is not given to a pregnant woman because of the act of adultery, because iddah itself is only given to a woman who is bound by a valid marriage as a tribute to her. As for women who commit adultery, it is not determined by law.

Based on the information above, it can be understood that the marriage contract against the adulterous woman is halal even though she has committed adultery and is pregnant, therefore the act of adultery which is essentially haram cannot prohibit the marriage contract whose law is halal and valid. The act of adultery is an improsudural of all effects or consequences that are not procedural, so it is considered non-existent, therefore the position of the child in the womb of the woman who commits adultery is considered non-existent, because there is no marriage contract for a pregnant woman because adultery is halal and legal.

Imam Malik and Ahmad bin Hambal said that it is not permissible to marry a pregnant woman because of adultery with another man until she gives birth to her womb. According to Imam Malik and Ahmad bin Hambal, it is the same as those who are married in the form

of adultery or syubhat or pasid marriage, so they must purify themselves at the same time as iddah. To make evidence and strengthen their opinions, they put forward reasons with the words of the Prophet Muhammad PBUH which reads:

لَا يَحِلُّ لِأَمْرِي يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ أَنْ يَسْقِيَ مَاءَهُ زَرْعَ غَيْرِهِ

It is not halal for a person who believes in Allah and the Hereafter to sprinkle his water (sperm) on other people's plants, namely captive women who are pregnant (Tajuddin A, 1998:351) They also reasoned with the words of the Prophet Muhammad PBUH which was another: "Do not associate with a pregnant woman until she gives birth and a woman who is not pregnant until she has her period once". Imam Malik and Imam Ahmad bin Hambal concluded from these two hadiths, that a pregnant woman should not be married, because she needs iddah. They apply in general, including pregnant women from valid marriages, as well as pregnant women from the consequences of adultery. The determination of the prohibition of marriage for pregnant women began from their opinion, namely, pregnant women because adultery still has iddah, so pregnant women should not get married until they give birth to their womb. Thus, pregnant women are prohibited from marrying (Syarif. H, 2018).

In fact, according to Imam Ahmad bin Hambal, a pregnant woman due to adultery must repent, only then can she marry the man who married her. The opinion of these two Imams can be understood to avoid the mixing of offspring, namely offspring who have seeds and offspring who marry their mothers. Therefore, Imam Malik and Ahmad bin Hanbal impose iddah in general on pregnant women, whether their pregnancy is due to a valid marriage, or whether their pregnancy is the result of sexual intercourse outside of marriage. Thus, the marriage of pregnant women is prohibited.

In Presidential Instruction No. 1 of 1991 concerning the dissemination of the Compilation of Islamic Law (KHI), Chapter VIII of Pregnant Marriage is the same as the issue of marrying pregnant women. Article 53 of the Chapter contains three (3) paragraphs, namely: 1) A woman who is pregnant out of wedlock can marry the man who impregnates her; 2) Marriage with a pregnant woman mentioned in paragraph (1) can be carried out without waiting for the birth of her child; 3) By having a marriage when a woman is pregnant, there is no need for remarriage after the child is born (Dierjen. B, 2010:245).

According to the Compilation of Islamic Law (KHI), pregnant marriage is placed in the category of permissible law, not necessarily as embraced by life based on customary law. Indeed, the definition of the ability to marry pregnant as regulated in the KHI, more or less proceeds from a compromising approach with customary law. This compromise was made because considering the reality in fiqh that this issue is an effort, in addition to considering sociological and psychological factors. From these various factors, a conclusion was drawn based on the principle of *istislah*. Thus, the KHI drafting team argues that the benefits of allowing pregnant marriage are greater than prohibiting it, of course, with certain requirements (M. Yahya, 1993: 85).

The provisions of Article 53 of the KHI regarding the ability to marry pregnant women can be categorized as controversial because it will give birth to debates and cross-opinions from various circles. Opposing opinions will certainly object to this provision which is considered loose and tends to be compromising. This provision may be used as a legal umbrella for the legalization of adultery. Article 53 of the KHI does not provide sanctions or punishments for adulterers, but instead provides a solution for a person who becomes pregnant due to adultery to immediately carry out marriage. In fiqh it has been explained about the punishment for the perpetrator of adultery, including: if the perpetrator of adultery is married (*zina muhsan*), the punishment is to be abused a hundred times and then stoned. For unmarried adulterers (*zina ghairu muhsan*), the punishment is to be abused a hundred times and then exiled to another place for one year (Irfan, 2018).

However, the provisions of Article 53 of the KHI also hold on to logical reasons and can be used as a legal basis to be applied in the order of people's lives in Indonesia. The ability to marry a pregnant woman according to the provisions of Article 53 of the KHI, is expressly limited to marriage with the man who impregnates. This is based on the words of Allah SWT in Surah An-Nur verse 3 which reads:

الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ

“A man who commits adultery does not marry a woman who commits adultery or a woman who commits adultery. And a woman who commits adultery is not married to a man who commits adultery or a man who is an idolater. And that is prohibited for the believers” (Q. S An-Nur ayat 3)

The problem of marriage with a pregnant woman outside of wedlock due to adultery requires careful and thoughtful attention from the Marriage Registrar. This is due to the loosening of moral and ethical norms in some communities, especially those who are still teenagers and their religious awareness is unstable. Based on the observations made, Siantar Marimbun District as an area that is still thick with Batak culture and student culture believes that it is fading day by day with the influence of globalization culture that has permeated the countryside. This indication can be seen in the increasing symptoms of pregnant mating that occur in the Siantar area. Ironically, this pregnancy out of wedlock often happens, sometimes they do not see it as a violation which is a disgrace and moral depravity that needs to be corrected. The high number of cases of pregnant women's marriages that occurred in the Masaran District area recorded at the Religious Affairs Office of Siantar Marimbun District from year to year continues to increase. From the data we got from the archive of the marriage examination file of the NB model of pregnant women's marriage in KUA, Siantar Marimbun District in 2023, namely in February there was 1 case and in March and April, there were 2 cases.

Marriage of a Spouse Who Violates Moral Norms in the Criminal Code

According to the Criminal Code, the criteria for adultery are: first, sexual relations with women who are not wives, or with men who are not husbands. Adultery is carried out together, it cannot be carried out by one or two people of the same kind, namely. It cannot be done between men and men or women and women (Ledang. M, 2004: 42). So, adultery is the sexual relationship of a man or woman who is legally married to a woman or man who is not his wife or husband. So only violators who are legally married can be prosecuted based on Article 284 of the Criminal Code. If one of the adulterers is not legally married, then he cannot be tried for adultery, but he is tried for participating in the adultery and is burdened with the same responsibility as the adultery itself (Adami. C, 2005: 57).

The adulterer does not have to get married. He also does not have to obey Article 27 of the BW (Burgelijk. W). Meanwhile, he knew that his adulterer was subject to Article 27 of the BW. In other words, if one of the adulterers is married, then even if the adulterer is not married, he can also be accused of adultery, even if he commits adultery with a person who is not an adulterer, but in this case, he is punished not as an adulterer, but as an adulterer who

participates in adultery, but he is accused and will be burdened with the same punishment as what the adulterer receives.

If the two perpetrators of adultery are not legally married, then the Criminal Code cannot prosecute both of them because Article 284(1) states that adultery can be prosecuted against those committed by a married man or a married woman. In this context, article 27 of the Civil Code (BW) applies which states that a man may only marry one woman and a woman may only marry one man. In this case, criminal law is heavily influenced by European traditions, especially in the Netherlands. Because there (the Netherlands), both husband and wife are still considered to commit adultery even by having sex with a third party (M. Sudrajat, 1986: 166).

Furthermore, Article 284 of the Criminal Code is an absolute complaint. This means that it cannot be prosecuted unless the offended man or woman (who has been humiliated or harmed) files a complaint, in this case, such as the husband or wife who is the victim of infidelity. Therefore, the complaint cannot be made except by the husband or wife. In matters of adultery, the Reported Perpetrator cannot be reported as an adulterer alone. However, these two factors must be presented. Considering that adultery is a criminal act involving two people, namely. Absolute participation, which is inseparable from each other, even if the complainant only concerns one of the two persons committing adultery, does not result in the person being prosecuted. someone who has never been complained about by a complainant.

A complaint can be interpreted as an objection in the sense of "disagreement". If it is considered that there is "consent", it does not meet the prosecution requirements. If adultery occurs because the wife or husband of the perpetrator gives consent to his partner's adultery, then it cannot be considered adultery. Because the author's husband or wife agrees to it. However, Articles 72, 73, and 75 do not apply to this type of mixing device. Article 72 applies to applicants who are under the age of 16 or minors on probation. Article 73, which regulates the right of appeal for victims, no longer exists. And Article 75 on the right to withdraw complaints within three months. In the case of adultery, the complaint can be withdrawn provided that the case has not been started in court. In practice, even before the investigation hearing begins, the judge asks the applicant if he will continue to appeal, and if so, then the investigation begins (Syamsul. H, 2015).

The crime of adultery in article 284 of the Criminal Code is far different from what is stated by the hadiths of the Prophet PBUH and the opinions of scholars who sort and classify adultery into two forms, namely *zina muhsan* and *zina ghairu muhsan*. Meanwhile, according to Article 284 of the Criminal Code, the categories of *zina muhsan* and *ghairu muhsan* are unknown. In the article, it is stated that *zina* is only adultery whose perpetrator is bound by the marriage contract, which is a case of infidelity that occurs in the household and is included in the complaint offense so that in addition to the Criminal Code does not recognize the term *zina ghairu muhsan*, it also contains the understanding that as long as the perpetrators of the husband or wife who still feel safe with the adultery offense committed by their spouse, So the perpetrator cannot be prosecuted because he is not complained about by the party who feels aggrieved. So, if the perpetrator of adultery is consensual and is not bound by marital ties, then the Criminal Code is not considered a punishable criminal act.

In this case, Abduh Malik stated that if a man who has a wife has sexual intercourse (having sex) with another woman while the wife does not object to her husband having an affair, then the Criminal Code will not be applied to the husband. Likewise, if a woman who has a husband has sex with another man while the husband does not object, then the wife who commits adultery will also not be punished by the Criminal Code. Thus, the act of adultery committed by a husband or wife will be able to continue. So, it means that Article 284 of the Criminal Code will not function to prevent the occurrence of adultery in society and even provide opportunities for adultery to rise in society (Abduh. M, 2003: 191-192).

Article 42 of Law No. 1 of 1974 concerning Marriage and Article 99 of the Compilation of Islamic Law (KHI) The formulation of the SR article of the UUP reads A legitimate child is a child born in or as a result of a valid marriage. This article is adopted in its entirety with the addition of letter b in article 99 of the Compilation of Islamic Law (KHI) as follows: Legitimate children are: a. children born in or as a result of a valid marriage; b. the result of a lawful act of husband and wife outside the womb and born by the wife (Asmanizar).

According to the author, the formulation of article 42 of the UUP and article 99 of the KHI letter a is contrary to the content of the sahih hadith narrated by al-Bukhari and Muslim al-waladu lilfirasy which emphasizes that a legitimate child is a child born as a result

of a valid marriage, not just born in a valid marriage. If you use the word in, it means that at the time the child is born, the parents as the adulterous spouse have been bound in a marriage. Even if on the eve of the birth of the unfortunate baby their marriage process has just taken place, then within the next few minutes the baby is born, then based on the formulation of article 42 of the Marriage Law and article 99 KHI letter an above is still declared as a legal child even though the fertilization of the baby's embryo has occurred when they are not married even though article 42 of Law No. 1 of 1974 does not contradict the 1945 Constitution, However, it would be very good if the words "in" contained in the formulation of this article were to be reviewed or if necessary omitted. Because with the word a in e, the implications and great influence will occur on the legalization of adultery. This can happen because, with the formulation of this article, the state automatically means that it recognizes permits, and legalizes the process of sexual intercourse before marriage. This is contrary to the fundamental principle in Islamic Law, regarding the observance of nasab.

Differences in the Perspectives of National Criminal Law and Islamic Law on Zina

Although the nomenclature of adultery is used in both Islamic criminal law (*jinayah*) and national criminal law, there is a fundamental difference between the two. In Indonesia's national criminal law, adultery is only one part of the sub-discussion of crimes against morality (Second Book Chapter XIV, Criminal Code). Of the 25 (twenty-five) articles that regulate moral crimes, there is only one article that regulates adultery, even if it is only adultery committed by a married man and a woman, or participating in committing adultery for either a man or a woman who is known to be married. Meanwhile, from the perspective of Islamic criminal law (*jinayah*), there is no difference between adultery committed by men and women, both married and unmarried (Yusriana, 2021).

Based on the discussion above, there are several similarities and differences in provisions between the national criminal law and Islamic criminal law (*jinayah*) in highlighting the problem of adultery. The similarity lies in the existence of sexual relations that are confirmed by men and women outside of marriage, but the difference is in the status of the adulterers. Islamic criminal law (*jinayah*) views any sexual intercourse outside of marriage as adultery and is punishable, regardless of whether he is married or not. On the other hand, the national criminal law based on the perspective of Western law does not view

all sexual relations outside marriage as adultery, while adultery is only applied to sexual intercourse outside of marriage in which the perpetrators are people who have previously been married.

The striking difference in principle between the two poles of law is that Western criminal law which is the benchmark of national criminal law considers the act of adultery as a personal matter that only offends individual relationships and does not become a problem in society so that intercourse carried out by single men and women based on consensual intercourse cannot be punished. In fact, from the perspective of Islamic criminal law (*jinayah*), such a thing falls into the category of zina ghairu muhsan.

Similarities and Differences in Islamic Law with the Criminal Code in Marriage as a Sanction for Violating Moral Norms

Islamic law explains that adultery is sexual intercourse that is carried out outside of a valid marriage. This is different from the formulation of the Criminal Code, that adultery only applies if the two perpetrators are legally married. So only perpetrators who are tied to a legal marriage can be charged with adultery. In terms of the criteria for the crime of adultery, several things are used as a benchmark in determining the crime of adultery, which of course in each of these criteria there are similarities and differences between Islamic law and the Criminal Code.

The criteria for the crime of adultery include: First, intercourse outside of a valid marriage that is carried out intentionally. Islam has categorically said that any sexual intercourse performed outside the legal marriage bond is adultery. The Criminal Code also argues that all intercourse that occurs outside of a valid marriage and is carried out intentionally is an act of adultery. However, unlike Islamic law, in the Criminal Code, only perpetrators who can be charged with adultery are perpetrators who are bound by a legal marriage.

Second, the perpetrators of the crime of adultery who can be sanctioned according to Islamic law are mukallaf people. Islamic law does not distinguish in terms of the status of the adulterer, whether he is married or unmarried, and whether he is in a legal marriage bond or not. However, in imposing sanctions, Islamic law distinguishes adulterers into two categories, namely muḥṣan and ghair muḥṣan (Irfan. A, 2023). An adulterer is a married

adulterer regardless of whether he is in a valid marriage bond or not at the time of adultery, in the sense that he is still in the status of husband or wife or has the status of a widower or widow, as long as he has been legally married, then it is categorized as a muḥṣan adulterer. Meanwhile, a ghair muṣan adulterer is an adulterer who has never been married. In the Criminal Code, the term zina muḥṣan or ghair muḥṣan is not known.

The Criminal Code also requires the perpetrator to be subject to article 27 of the BW because article 27 of the BW adheres to the principle of monogamy, where a man is only allowed to marry a woman, and vice versa a woman is only allowed to marry a man. So that for adulterers who are not subject to article 27 BW, they cannot be categorized as adulterers or perpetrators participating in adultery because they are considered to adhere to the principle of polygamy. In fact, the Criminal Code requires that only perpetrators who are in a legal marriage bond and who are subject to article 27 of the BW can be charged with the law.

Third, it is not done because it is forced. Islamic law and the Criminal Code agree that the crime of adultery is sexual intercourse committed by two consensual people. This means that the intercourse was carried out on the basis of the consent of the two. So that when one of them does not want the intercourse, the intercourse is no longer referred to as the crime of adultery but is included in the category of rape. In the case of rape, legal sanctions only ensnare the rapist, while rape victims cannot be charged with rape because the victim does not want the intercourse and she is in a disadvantaged position.

Fourth, the criminal process. In Islamic law, zina is included in the jarimah ḥudud which is the right of Allah SWT. absolutely. So that in the process of punishment, it requires a cautious attitude, and strong evidence is needed to decide the problem of adultery. There are at least three pieces of evidence to prove that adultery has occurred, namely: witnesses, confessions, and qarinah. From some of the evidence, it can be seen that adultery in Islamic law can be criminalized when at least one of the types of evidence exists. So that there is no need for a complaint from the aggrieved party, as long as the evidence of adultery has occurred, the law applies to the perpetrator.

Islamic law also does not limit only the aggrieved husband or wife to those who can report it, but anyone who knows that adultery has occurred as long as all the evidence is met. This is different from the Criminal Code which states that adultery is an absolute complaint

so that when there is no complaint from the aggrieved party, namely the perpetrator's husband or wife, the perpetrator cannot be charged with adultery. In addition, the Criminal Code permits the complainant to withdraw his claim as long as the incident has not yet begun to be examined in the court session, although, before it starts, the judge still asks the complainant whether he sticks to his complaint if it is still there, then the examination begins. This is different from Islamic law where when it is known that adultery has occurred, the punishment cannot be canceled. The crime of adultery is included in the *jarīmah ḥudūd* which is the absolute right of Allah SWT. and the punishment has been set in the Qur'an.

Fifth, sanctions for the crime of adultery. If Islamic law provides for the punishment of aggravation or stoning, then the Criminal Code only threatens him with a maximum prison sentence of nine months. This difference occurs because the basis of the two laws is different. Islamic law relies on the Qur'an and Hadith, while the Criminal Code only comes from the results of human thought. Moreover, the Criminal Code is a product of Western people's thinking.

Sixth, the purpose of prohibiting adultery. The purpose of prohibiting adultery by Islamic law is: a) to maintain the preservation and development of offspring; b) to maintain household harmony upholding dignity and self-esteem from disgrace and stains; c) to prevent the onset of deadly diseases and viruses. Meanwhile, the Criminal Code considers that the crime of adultery is a form of denial or betrayal of marriage. So, from here, it can be seen that the purpose of prohibiting the crime of adultery by the Criminal Code is to maintain domestic harmony. The Criminal Code does not pay attention to other possibilities arising from adultery. Such as the transmission of deadly diseases and viruses due to unhealthy body relationships. Venereal diseases such as HIV/AIDS virus, gonorrhoe disease, or syphilis, are types of diseases that are worrisome. The disease is transmitted through sexual intercourse (Zainuddin. A., 2007: 51).

Analysis of Islamic Law on forced marriage as a sanction for adultery, **the first** we see in the legal basis that the adulterer is a group of people who have entered the age and conditions of compulsory marriage, that is, those who are forced to marry are the people concerned, that they cannot refrain from despicable acts if they do not get married immediately, **the second** must see the benefits, marrying an adulterer is good because it is a

form of responsibility for the act, while Islamic sources based on Surah An-Nur verse 3 explain that adulterers can only marry adulterers, so they should be married only with adulterers. Islamic law only provides information about the permissibility of adulterers. Meanwhile, the fatwa of the MPU of the Religious Affairs Office (KUA) of Pematang Siantar City in a positive law based on Fatwa No. 03 of 2009 concerning the Perverted Marriage Law, states that perverted marriage is allowed, but marriage does not include punishment because there is no punishment for marriage according to sharia. In addition, in the KHI regulated in Presidential Decree Number 01 of 1991 and Decree of the Minister of Religion Number 154 of 1991, it is regulated that women who become pregnant out of wedlock may only marry men who are pregnant.

CONCLUSION

The process of implementing the marriage decision as a sanction for adultery includes searching for information and complaints about immoral acts committed by the perpetrators, checking or rechecking to find out the truth of the news, Ambush to arrest the perpetrators of immoral acts, Investigation by delving into the cases carried out by the perpetrators of acts of violating moral norms, providing punishments or sanctions which in this case must go through customs and also the Decree of the Head of KUA and the actions taken by marrying the adulterous couple, and the last is to inform the parents about the case that is carried out to further arrange the *jadwa* to marry the two couples who violate the Susila norm.

There are several similarities and differences in provisions between the national criminal law and Islamic criminal law (*jinayah*) in highlighting the problem of adultery. The similarity lies in the existence of sexual relations that are confirmed by men and women outside of marriage, but the difference is in the status of the adulterers. Islamic criminal law (*jinayah*) views any sexual intercourse outside of marriage as adultery and is punishable, regardless of whether he is married or not. On the other hand, the national criminal law based on the perspective of Western law does not view all sexual relations outside marriage as adultery, while adultery is only applied to sexual intercourse outside of marriage in which the perpetrators are people who have previously been married. The striking difference in principle between the two poles of law is that Western criminal law which is the benchmark

of national criminal law considers the act of adultery as a personal matter that only offends individual relationships and does not become a problem in society so that intercourse carried out by single men and women based on consensual intercourse cannot be punished. In fact, from the perspective of Islamic criminal law (*jinayah*), such a thing falls into the category of *zina ghairu muhsan*.

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