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REVIEW ARTICLE

**CRIMINAL POLICY OF ADULTERY IN
INDONESIA**

Anis Widyawati

¹ Faculty of Law, Universitas Negeri Semarang, Indonesia

✉ anis@mail.unnes.ac.id

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ABSTRACT

Judge courage needed in deciding adultery cases in article 284 of the Criminal Code for perpetrators who have not been bound by marriage, the judge can apply based on the 1945 Constitution and the Law on Judicial Power, which states the source of law is not only the Law (expansion of the principle of material legality) but can also source from code that lives in the community (customary law). This research is intended to analyze and describe the penal policy (criminal law policy and politics of criminal law) concerning adultery in Indonesia. This research uses normative legal research, where the Author analyze and compare all laws and regulations concerning to adultery in Indonesia and some theories of adultery in global context. This paper emphasized that adultery not only against religious values but also customary values (customary law). The formulation of adultery concept in Indonesian Penal Code affected by religious teachings and national ideology of Pancasila.

Keywords: Adultery; Criminal Policy; Penal Policy; Criminal Code

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INTRODUCTION

After Indonesia declared its independence in 1945, to fill the void of criminal law imposed in Indonesia, based on Article 2 of the transitional provisions of the 1945 Constitution and also affirmed in Government Regulation No. 2 of 1945 concerning All State Agencies and Regulations existing until its establishment The Republic of Indonesia on August 17, 1945, as long as the new constitution had not had hold yet, it was still valid as long as it did not conflict with the 1945 Constitution. Therefore, WvSNI was still in force. The application of WvSNI into Indonesian criminal law uses Law No. 1 of 1946 concerning Indonesian Criminal Law Regulations. Article VI of Law No. 1 of 1946 states that the name *Wetboek van Strafrecht voor Nederlandsch Indie* was changed to *Wetboek van Strafrecht* and was called the "Criminal Law Book" (KUHP). Besides, this law also does not re-impose criminal regulations

issued since March 8, 1942, both published by the Japanese government and by the commander in chief of the Dutch East Indies army. Because the struggle of the Indonesian Nation had not completed in 1946 and the dualism of the Criminal Code emerged after that year, in 1958, Law No. 73 of 1958 was issued which enacted Law No. 1 of 1946 for the entire territory of the Republic of Indonesia. The development of the Criminal Code in the practice of criminal law lags. There is an ideological paradigm that is still oriented towards "legal certainty" and leaves the meaning of "justice." The fundamental values of human rights, the substance of the law and the principle of equality before the code in the concept of the 1945 Constitution after the amendment have not had entirely transforms into the realm of law enforcement. So that the legal ideology contained in the Criminal Code and Criminal Procedure Code contains several obstacles to achieving justice. More fundamentally, the Penal Code (KUHP) has a culture that is different from the culture of the Indonesian people. After a long time, the Penal Code has been in force in Indonesia. It turns out that it still leaves a variety of social problems that occur in Indonesia because there are a conflict¹ between religious values, social, cultural, and legal interests.

The issue of adultery offense² is an actual example of the clash between the understanding and understanding of adultery in the Criminal Code with the legal³, religious⁴, social⁵, and cultural interests⁶ of the community⁷. Conflicts that often occur in the community often lead to a new crime — the weak practice of law enforcement⁸.

In 2002, a survey of the Love and Humanitarian Studies Institute and the Business and Humanities Training Center (LSCK PUSBIH) published on Jogjakarta students. The study was conducted for three years, from July 1999 to July 2002, involving around 1,660 respondents from 16

¹ Anis Widyawati, *Penal Mediation As An Alternative Dispute Resolution of Social*, 9 44–49 (2016).

² *Id.*

³ Christopher Bennett, *The authority of moral oversight: On the legitimacy of criminal law*, 25 LEG. THEORY 153–177 (2019).

⁴ Mihai Iulian Necula, *Aspects Concerning the Penal Protection of the Freedom of Religious Beliefs*, 149 PROCEDIA - SOC. BEHAV. SCI. 639–646 (2014).

⁵ Otwin Marenin, *The tragic core of criminal justice: Coercive social control and the loss of innocence*, 58 INT. J. LAW, CRIME JUSTICE 91–99 (2019).

⁶ *Id.*

⁷ Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 CALIF. LAW REV. 1415 (2002).

⁸ C.M. Perales, *Criminal Enforcement of Environmental Laws*, 1 in ENCYCLOPEDIA OF TOXICOLOGY 1066–1069 (Third Edit ed. 2014).

tertiary institutions, both public and private, in Jogjakarta. Of the 1,660 respondents, 97.05 % claimed to have lost their virginity while in college, having had sex in pairs or adultery. Judging from the place they had free sex, as many as 63 % had free sex in the men's boarding house partner. As many as 14 % do at the women's boarding house or rented house.

Furthermore, 21 % in jasmine class hotels scattered in Jogjakarta and 2 % in open tourist attractions. The data above shows that the boarding house has become a den for free sex. Then the discovery of research in Ponorogo that 80% of young women have premarital sexual relations while in young men, the percentage of data figures is slightly larger, this data is the result of a random survey over a period for six months conducted by the Office of Women's Empowerment and Child Protection of Ponorogo Regency on December 17, 2010.

ADULTERY IN THE STUDY IUS CONSTITUTUM

Based on the provisions of Article 284 of the Criminal Code⁹, if men and women are both unmarried and have sex outside of the legal marriages, then it cannot be categorized as adultery and cannot be trapped by law. In other words, the provisions of Article 284 of the Criminal Code, both directly and indirectly, provide opportunities for extramarital intercourse between men and women, each of which is not bound by marriage to another person. Thus, if the case buys to justice¹⁰, it does not meet the elements of the Article 284 Criminal Code Criminal formula. However, judge Bismar Siregar made a shocking ruling where adultery by a single man and woman was given a decision in court. According to him, we should not only focus on formal law but also the law that carries out justice¹¹. Because the prosecutor included Article 378 of the Criminal Code¹² concerning fraud, which the word "goods" be considered an "object," then Judge Bismar Siregar used the article to

⁹ PIPIN SYARIFIN, *DELIK PERZINAHAN HUKUM PIDANA DI INDONESIA* (2000).

¹⁰ Anis Widyawati, *Pendekatan Restorative Justice Sebagai Upaya Penyelesaian School Bullying*, YUSTISIA (2014).

¹¹ Marenin, *supra* note 5.

¹² Dudung Mulyadi, *Unsur-Unsur Penipuan Dalam Pasal 378 Kuhp Dikaitkan Dengan Jual Beli Tanah*, 5 J. ILM. GALUH JUSTISI 206 (2017).

uphold justice, in that case, the woman gave her honor and the man promised to marry her, therefore included in fraud because of broken promise the man.

The existence of Article 284 KUHP paragraph 1-5 clashes with the highest legal basis, namely the 1945 Constitution in Article 28B paragraph (1) and (2), Article 28C paragraph (2), Article 28D paragraph (1). Article 28B paragraph (1) and (2) of the 1945 Constitution, every person has the right to form a family and continue the descent through a legal marriage. Article 28C paragraph (2) of the 1945 Constitution, every person has the right to advance themselves in fighting for their collective powers to develop their society, nation, and state. Article 28D paragraph (1) of the 1945 Constitution, every person has the right to recognition of guarantees, protections and certainty of law that is just and equal treatment before the law¹³. The imbalance between Article 284 of the Criminal Code and the 1945 Constitution has made several applicants such as Prof. Dr. Ir. Euis Sunarti., M.S., Rita Hendrawaty Soubagjo, M.Sc., Dr. Dinar Dewi Kania, and nine other petitioners to test the material to the Constitutional Court Judge on April 19, 2016, in case Number 46 / PUU-XIV / 2016. Material tests are carried out to request Article 284 of the Criminal Code so that adultery is not only for men and women who are married, but adultery must be extended not only for people who are bound by marriage. This material test intends so that every individual is careful in the association so as not to fall into adultery, and this means that the applicant asks the Constitutional Court to formulate a new crime. However, the Constitutional Court considered the arguments of the petitioners were groundless according to the law so that the material test submitted by the applicant experienced rejection from the Constitutional Court Judge.

Mahfud MD explained, as a judicial institution, the Constitutional Court did not have the authority to create new legal norms, regulating to allow or prohibit an act was the domain of the legislature or legislators, namely the President and the Parliament¹⁴. Arranging to enable or prevent something is the legislative domain, not the judiciary domain. The Constitutional Court refused to give an interpretation because it regulates in the Criminal Code. Adultery is still prohibited and now state in the Draft Penal Code, and this was also strengthened by Constitutional Court Justice

¹³ BARDA NAWAWI ARIEF, *BUNGA RAMPAI KEBIJAKAN HUKUM PIDANA* (2016).

¹⁴ MOH. MAHFUD. MD, *POLITIK HUKUM DI INDONESIA* (2019).

Maria Farida, who said, the Court did not have the authority to formulate new criminal acts because such power was in the hands of the President and the Parliament. The Constitutional Court may not enter into the political realm of criminal law. Criminal law products are born from criminal policy or criminal law politics that form code¹⁵. The Constitutional Court may not enter the political sphere of criminal law.

ADULTERY IN THE STUDY IUS CONSTITUENDUM

Legal politics is an activity of choosing and ways to be used to achieve specific social and legal goals in society¹⁶ Political law is a policy of the State through the agencies of the State that are authorized to set the desired regulations, which expected to be used to express what contained in society and to achieve what is aspired (*ius constituendum*). And efforts to realize reasonable rules by circumstances and situations at a time. Political law is the legal policy (legal policy) that would or has been implemented nationally by the government in its implementation through the development of legislation that has the core of lawmakers and renewal of legal materials that are considered foreign and or not by the needs of the creation (*ius constituendum*) of law required. The implementation of existing statutory provisions includes the affirmation of the functions of the institution and the formation of members of law enforcement¹⁷.

Thus, seen as part of legal politics, the politics of criminal law, according to Barda Nawawi Arief, implies how to try or make and formulate excellent criminal legislation¹⁸. Besides, running the politics of criminal law means holding elections to achieve the best results of criminal legislation, in the sense of meeting the conditions of justice and usability, to deliver effective and efficient results. Policymakers can utilize the information

¹⁵ Nina Persak, *Beyond public punitiveness: The role of emotions in criminal law policy*, 57 INT. J. LAW, CRIME JUSTICE 47–58 (2019).

¹⁶ M. Yasin Al Arif, *Penegakan Hukum dalam Perspektif Hukum Progresif*, 2 UNDANG J. HUK. 169–192 (2019).

¹⁷ Dian Latifiani et al., *Advocate as law enforcer in the implementation of e-court*, 11 INT. J. INNOV. CREAT. CHANG. 439–449 (2020).

¹⁸ BARDA NAWAWI ARIEF, PEMBANGUNAN SISTEM HUKUM NASIONAL (2012).

provided by criminology. Therefore, ignoring data from research results from criminology will result in the formation of laws that are not functional. Another thing related to the politics of criminal law¹⁹ is how criminal law can appropriately formulate and provide guidance to legislators (legislative policy), application policy (judicial policy), and implementation of criminal law (executive policy).

Legislative policy is a very decisive stage for the next steps because when criminal legislation is about to be made, the direction to which the law intended is determined or, in other words, what actions deemed necessary to serve as something that is prohibited by criminal law, this means it involves the process of criminalization²⁰. The criminalization, according to Sudarto, can be interpreted as the process of determining an act of a person as an act that can be convicted. The process ended with the formation of a law whereby the act threatened with a criminal sanction²¹. In this connection, writes that the policy to make reasonable criminal law regulations cannot separate from the purpose of overcoming crime. Meanwhile, the understanding of crime prevention is an effort to control crime so that it is within the limits of community tolerance²². Policies adopted by the Indonesian people in the context of carrying out criminal law reforms through 2 channels, namely:

- a. Establishment of criminal legislation, which means to amend, add, and complete the current Penal Code.
- b. Making Draft Penal Code replace the current Penal Code.

Based on this, an effort must be made by the state with the reformulation of the crime of adultery in the upcoming criminal law policy. The crime prevention policy with criminal law is, in essence, part of the law enforcement policy²³. Therefore, crime prevention policies or commonly known as criminal politics (Criminal Policy), in essence, a reasonable effort from the community in tackling crime. This view is in line with the opinion

¹⁹ Michael A. Rustigan, *A reinterpretation of criminal law reform in nineteenth century England*, 8 J. CRIM. JUSTICE 205–219 (1980).

²⁰ Anis Widyawati, *Regulations of penitentiary law in indonesia*, 18 INTERNATIONAL JOURNAL OF BUSINESS, ECONOMICS, AND LAW. 53–59 (2019).

²¹ Věra Kalvodová & Eva Žatecká, *Unfair Competition and its Possible Criminal Sanctions*, 12 PROCEDIA ECON. FINANC. 283–287 (2014).

²² Kent Roach, *Four models of the criminal process*, 89 J. CRIM. LAW CRIMINOL. 671 (1999).

²³ Murat C. Mungan, *The certainty versus the severity of punishment, repeat offenders, and stigmatization*, 150 ECON. LETT. 126–129 (2017).

of Marc Ancel who formulated criminal politics as The Rational Organization of The Control of Crime by the Society²⁴.

The basis of religious values firmly held by the Indonesian community and also found in the first sage of Pancasila, which reads "Almighty God." The importance of living in society also considers adultery an amoral act that not everyone can do. All religions in Indonesia prohibit people from committing adultery. Religion plays a vital role in Indonesian law, namely the basic ethics of the State deriving from the Divine morals found in religions. It refers to the 1 Pancasila which says, "Almighty God." Besides, the teachings of belief adopted by the community influence the formation of values living in society. So, the instructions of religion, especially the universal ones, are fundamental to the structure of national²⁵ law. The ethical²⁶ approach is the mandate and at the same time demands of national development and national law development due to the National Law System reforms²⁷ that have always aimed at national law system- Pancasila. Pancasila is a national wisdom / national genius that contains the three pillars of God (religious), humanitarian (humanistic), social (democratic, national and social) components. The existence of the component of the Godhead means that in the course of the Pancasila, it also contains "religious wisdom/ genius"²⁸.

Adultery in addition to being against religious values, is also contrary to the law that lives in society (customary law). In customary law, adultery committed by a person who has one or both of them has bound by marriage. Most indigenous people will provide sanctions in the form of ostracism, expulsion from customary associations, and others according to the provisions²⁹ of the customary law of their area. According to Lampung custom, it also regulated regarding the act of adultery committed by the wife or husband of another person mentioned in the Kunta Raja Niti (KRN) that

²⁴ Anis Widyawati, *Akar Konflik Dalam Masyarakat Multikultural Di Karimunjawa*, 93 YUST. J. HUK. 602–616 (2015).

²⁵ Necula, *supra* note 4.

²⁶ Krzysztof Szczucki, *Ethical legitimacy of criminal law*, 53 INT. J. LAW, CRIME JUSTICE 67–76 (2018).

²⁷ Jonathan D. Casper & David Brereton, *Evaluating Criminal Justice Reforms*, 18 LAW SOC. REV. 121 (1984).

²⁸ Necula, *supra* note 4.

²⁹ Thomas Marquenie, *The Police and Criminal Justice Authorities Directive: Data protection standards and impact on the legal framework*, 33 COMPUT. LAW SECUR. REV. 324–340 (2017).

an honest trial must be conducted and witnesses along with evidence³⁰ with the penalty³¹ must pay fines³² and other costs³³. Whereas in the Minangkabau custom, the sanction is in the form of being banished from the *adat* community and the death penalty. Provisions of customary law will further emphasize how guilty of adultery because it is more animating the alliance of indigenous peoples themselves. Indigenous peoples recognize that sanctions are givens for acts that violate have binding legal force as well as the Criminal Code because the penalties provided are decisions and agreements with customary associations and based on the decisions of traditional leaders. Problems related to adultery that regulated in the Criminal Code are not by the moral values of the Indonesian religious community. According to *adat* law adultery is not only done by married people. So whether married or unmarried if intercourse outside a legal relationship is still considered a prohibited act and is also called adultery. Article 284 paragraph (1) of the Criminal Code stipulates that adultery can threaten with a nine-month prison sentence, both for the married offender and for those who have committed the act. However, according to customary criminal law, the severity or severity of the crime depends on the customary law applicable in each customary environment.³⁴ As for the actions of reaction or correction of crime in the environment of Indonesian indigenous peoples, the following steps known:

- a. reimbursement of material damages in various forms such as the compulsion to marry a defiled girl
- b. payment of *adat* money to those affected, in the form of magic objects as compensation for spiritual losses
- c. salvation (victim) to cleanse the community of all impurities
- d. a cover of shame or apology
- e. exile from the city and put people outside the legal system, and
- f. corporal punishment to the death penalty.

³⁰ Huw T.O. Davies et al., *Criminal justice: using evidence to reduce crime*, in WHAT WORKS? EVIDENCE-BASED POLICY AND PRACTICE IN PUBLIC SERVICES 92–116 (2012).

³¹ Michelle Miao, *Two years between life and death: A critical analysis of the suspended death penalty in China*, 45 INT. J. LAW, CRIME JUSTICE 26–43 (2016).

³² Thomas Schröder, *Corporate crime, the lawmaker's options for corporate criminal laws and Luhmann's concept of "useful illegality"*, 57 INT. J. LAW, CRIME JUSTICE 13–25 (2019).

³³ Stefan Volk, Helena Nguyen & Christian Thöni, *Punishment under threat: The role of personality in costly punishment*, 81 J. RES. PERS. 47–55 (2019).

³⁴ Miao, *supra* note 31.

Indonesian criminal law (Penal Code) adheres to the principle of legality³⁵, as stated in article 1 of the Criminal Code, that is, no act that may punish but on the strength of criminal rules in legislation that existed before the act committed. As a result of adopting this formal legality principle, the analogy interpretation should not use in determining the existence of a criminal offense while the principle of formal legality not known in traditional law. Any act or event that is contrary to propriety, harmony, order, security, a sense of justice and legal awareness of the community concerned, whether it is due to someone's actions or the actions of the ruler himself, then the act or event is considered a customary offense. Therefore, with the reason that humans will not be able to predict the future, the provisions in customary law are uncertain and open to all events or actions that may occur. The primary measure according to customary law³⁶, is a sense of justice and legal awareness of the community by the development of circumstances, time and place.

The principle of formal legality in article 1 paragraph 1 of the Criminal Code has expanded the source of law, namely the expansion of the principle of material legality that gives place to living law as a source of law, based on (a) the existence of various national legislative product policies after independence; (b) a sociological study of the characteristics of legal sources/principles of legality according to the views and thoughts of Indonesians that are not too formalistic and fragmented/partial; (c) various results of customary law research; (d) scientific agreements / national seminars; and (e) different comparative study results and international meeting documents/ statements.

The rule of law or certainty the law, both the 1945 Constitution and the Judicial Power Law do not use the terms legal certainty or law enforcement, but fair legal certainty (article 28D of the 1945 Constitution) or enforce law and justice (article 24 paragraph 1 of the 1945 Constitution and article 3 paragraph 2 of Law No. 4 / 2004 became article 2 paragraph 2 of Law No. 48/2009). So, there is the principle of balance between legal certainty and justice. Besides that, both according to the 1945 Constitution and the Law on Judicial Power, the source of the law is not only the law but

³⁵ Kalvodová and Žatecká, *supra* note 21.

³⁶ Widyawati, *supra* note 1.

can also source from the code that lives in society. So, there is a balance between written legal sources and legitimate unwritten sources.

Reformulation of the substance of the law governing article 284 of the Criminal Code requires regarding adultery committed both by people who are not married and those who are married. The upcoming criminal law policy related to infidelity contained in articles 417-419 of the Criminal Code CHAPTER XV CRIMINAL ACTIONS IN DECISION Part Four adultery.

Article 417

- (1) Every person who has intercourse with a person who is not his husband or wife convict of adultery with a maximum imprisonment of 1 (one) year or a fine of category II.
- (2) Criminal acts, as referred to in paragraph (1) not prosecuted except for complaints from husband, wife, parents, or children.
- (3) The claims related to in paragraph (2) do not apply the provisions referred to in Article 25, Article 26, and Article 30.
- (4) Complaints can be withdrawn as long as the examination at a court hearing has not begun.

Article 418

- (1) Any person who lives together as a husband and wife outside of marriage shall sentence to a maximum imprisonment of 6 (six) months or a maximum fine of category II.
- (2) The criminal offense referred to in paragraph (1) is not prosecuted except for complaints from husband, wife, parents, or children.
- (3) Charges, as referred to in paragraph (2), may also be filed by the village head or by other names as long as there are no objections from the husband, wife, parents, or children.
- (4) The complaints referred to in paragraph (2) do not apply the provisions of Article 25, Article 26, and Article 30.
- (5) Claims can be withdrawn as long as the examination at a court hearing has not begun.

Article 419 “Any person who has intercourse with someone he knows that that person is a family member in a straight line or sideways until the third-degree sentenced to a maximum imprisonment of 12 (twelve) years”.

One of the concerns of many parties related to the cohabiting article contained in the Draft Penal Code, for example, article 417 paragraph 1 and

article 418 paragraph 1. This article raises concerns, especially from the tourism industry in Bali. Many Balinese entrepreneurs, who are troubled by the existence of materials of marriage or adultery³⁷, where relationships without marital ties can be convicted, while many foreign tourists in Bali cannot show marital status.

The anxiety of many parties regarding the crime of adultery in the Draft Penal Code, it would be nice if it should be contemplated based on the thought of the exact scientists who acknowledge the sophistication of God's knowledge, also contained within the legal scientist namely Prof. Mulyatno, Prof. Sudarto, Prof. Satjipto Rahardjo, Van Hamel. According to the scientists constitutionally and formally juridical, it recognizes in various juridical statements, which in essence understand religious wisdom and local wisdom. In line with religious wisdom and ethical guidance, Allah raises the degree of people who believe and have knowledge (QS: Al Mujadalah: 11), this means that the quality of human life according to the knowledge of God will be achieved if it based on the mental maturity (spiritual maturity) and the sophistication of intelligence (intellectual maturity). Such expressions should contemplate because, recently, we have felt an erosion of the quality of legal life in society. There are many disasters in law enforcement, including corruption, legal mafia, cases that touch humanity and justice, rampant adultery, which ignores the divine and local/national values, which revolves around the declining quality of legal culture, especially religious/ethical/moral values, and scientific culture. All of them identified the impression of secularization and separation between the science of law and the science of God, between the norms of the law (written law) and the rules that live in the personality/identity of a religious nation.

CONCLUSION

Adultery in addition to being against religious values, is also contrary to the law that lives in society (customary law). The reformulation of adultery articles in the Draft Penal Code adjusted to spiritual teachings, especially those that are universal because actual spiritual teachings are the basis or

³⁷ Ekow N. Yankah, *Race, Criminal Law and Ethical Life*, in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 625-648 (2019).

reference in the formation of national law because of the renewal of National Law System which has intended to aim is the Pancasila National Law System.

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ABOUT AUTHOR

Anis Widyawati is a Lecturer at the Law Faculty of Universitas Negeri Semarang since 2006. She obtained Bachelor of Law degree from Faculty of Law Universitas Jember and a Masters of Laws degree from Diponegoro University. Currently, the Author is pursuing a Doctor of Law program at Diponegoro University, Semarang, Indonesia. The focus of expertise includes Criminal Law, Special Criminal Law, and Penitentiary Law. Aside from being a lecturer, the Author is also active in various research projects and scientific conferences both at home and abroad. In addition, the author also devotes himself as an Instructor of Anti-Corruption of ACLC Anti-Corruption Commission of the Republic of Indonesia and SPAK (Women Voice of Anti-Corruption) in Central Java.

Quote

Passion is the evil in adultery. If a man has no opportunity of living with another man's wife, but if it is obvious for some reason that he would like to do so, and would do so if he could, he is no less guilty than if he was caught in the act.

Saint Augustine