

The Consideration of Maslahat in the Imposition of the Death Penalty for Serious Sexual Crimes in Indonesia

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Abstract

This research aimed to provide efforts to strengthen the law if changes to regulations occur, which must be accompanied by academic and socio-political approaches. In Indonesia, there is a new form of sexual crime whether verbal, non-physical, physical, or online. The prevalence of such incidents reflects a troubling trend that needs urgent attention from both authorities and society. This research was field research, equipped with qualitative data. The data sources included observational research, interviews, and documentation as well as literature studies by reviewing documents relating to criminal sanctions for adultery, especially from the Criminal Code, outside the Criminal Code, and manuscripts of Islamic criminal law. The beneficial theory used was the Al-Būṭī version, which emphasized the validity of *al-'uqūbah al-Islāmiyah*. The research findings revealed that in the event of changes to criminal law in Indonesia, *maslahat* considerations are prioritized, particularly in cases of grave sexual crimes, the death penalty should be applied. The government must consider things such as benefits, cultural values, and societal perspectives when making criminal punishment policies. In Indonesia, several backgrounds supported the choice of the death penalty for sexual crimes. The expected benefits are community protection, preventative action, justice for victims, and

the elimination of dangerous perpetrators in the future. The legal situation governing sexual crimes in Indonesia is increasingly pitiful, and a change is needed.

Keywords: Islamic criminal law; *budud*; *maslahah*; sexual crimes; death penalty

Introduction

Sexual harassment and violence in Indonesia are nothing new in terms of social problems in society.¹ On the one hand, this is often overlooked, it can also be seen from the organizational structure at the government level that only focuses on handling domestic violence cases so there is an impression of this action to be normalized.² The increasing number of cases of sexual violence has become a trigger for the emergence of movements to fight the normalization of these acts,³ starting from students, the public, women's, and children's activists, to several celebrities.⁴

Sexual violence cases occurring against women collected from data from the National Commission for Women revealed that there were 4,475 cases recorded in 2014, 6,499 cases in 2015, and 5,785 cases in 2016.⁵ According to data from the Indonesian Judicial Monitoring Society (MaPPI), it was reported that during the vulnerable period of August-October 2017, 367 reports of sexual violence were found. Interestingly, 275 of them occurred in Indonesia.⁶ Meanwhile, according to the Ministry of Women Empowerment and Child

¹ Nani Widya Sari et al., "The Enactment of Positive Law against Perpetrators of Sexual Deviancy in Public Space in Indonesia," *JURIS (Jurnal Ilmiah Syariah)* 22, no. 2 (2023): 343–53, <https://doi.org/10.31958/juris.v22i2.9065> The.

² Kathleen C. Basile, Ashley S. D'Inverno, and Jing Wang, "National Prevalence of Sexual Violence by a Workplace-Related Perpetrator," *American Journal Preventive Medicine* 58, no. 2 (2020): 2016–2223, <https://doi.org/10.1016/j.amepre.2019.09.011>.

³ Almaz Mamaru, Kinde Getachew, and Yasmin Mohammed, "Prevalence of Physical, Verbal and Nonverbal Sexual Harassments and Their Association with Psychological Distress among Jimma University Female Students: A Cross-Sectional Study," *Ethiopian Journal of Health Sciences* 25, no. 1 (2015): 29–38, <https://doi.org/10.4314/ejhs.v25i1.5>.

⁴ Seno Adhi Wibowo, "Child Sexual Violence and the Violation of Human Rights: The Darkest Side of Law Enforcement in Indonesia," *The Indonesian Journal of International Clinical Legal Education* 2, no. 4 (2020): 422–34, <https://doi.org/10.15294/ijicle.v2i4.43152>.

⁵ Komnas Perempuan, "Perempuan Dalam Himpitan Pandemi: Lonjakan Kekerasan Seksual, Kekerasan Siber, Perkawinan Anak, Dan Keterbatasan Penanganan Di Tengah Covid-19" (Jakarta, 2021), <https://komnasperempuan.go.id/siaran-pers-detail/catahu-2020-komnas-perempuan-lambar-fakta-dan-poin-kunci-5-maret-2021>.

⁶ Brilio, "Darurat Kekerasan Seksual," Brilio Case, n.d., <https://www.brilio.net/stories/kekerasan/>.

Protection (MoWECP), sexual violence cases in Indonesia were the highest in 2020, namely around 7191 cases.⁷

Sexual abuse is a problem that has attracted a lot of attention in both children and adults.⁸ However, victims often prefer to remain silent for several reasons, even though it may have long-term effects on them. Victims of sexual harassment need to be educated to raise awareness of the risks involved. Sexual harassment is unwanted actions and refers to sexual acts. Not just touching, even staring lustfully, or displaying pornographic material can be categorized as this act. If allowed to continue, this sexual harassment has a big risk of becoming sexual violence.

In Indonesia, there is a new problem related to sexual crimes, namely pedophilia.⁹ Pedophilia is a sexual preference disorder that occurs in adults who obtain sexual satisfaction through physical contact with children.¹⁰ Sexual crimes also occur in the world of education,¹¹ with sexual harassment becoming an epidemic throughout the global higher education system and impacting individuals, groups, and entire organizations in profound ways.¹² Precarious working conditions, hierarchical organizations, the normalization of gender-based violence, toxic academic masculinity, a culture of silence, and a lack of active leadership are all key features that enable sexual harassment.

In recent years (2017-2023), there have been widespread criminal cases with very great intensity.¹³ The presence of Islamic criminal law provides severe sanctions against perpetrators of sexual crimes,¹⁴ in accordance with the

⁷ Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, "Angka Kekerasan Terhadap Anak Tinggi Di Masa Pandemi, KEMEN PPPA Sosialisasikan Protokol Perlindungan Anak," Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2020, <https://www.kemenpppa.go.id/index.php/page/read/29/2738/angka-kekerasan-terhadap-anak-tinggi-di-masa-pandemi-kemen-pppa-sosialisasikan-protokol-perlindungan-anak>.

⁸ Lira Erwinda, Herman Nirwana, and Afdal Afdal, "Analysis of Sexual Harassment Instruments by Rasch Modeling to Identify Sexual Harassers," *COUNS-EDU: The International Journal of Counseling and Education* 5, no. 1 (2020): 1–5, <https://doi.org/10.23916/0020190417540>.

⁹ Islamul Haq et al., "Paraphilia Exhibitionism between Sharia and Law: A Comparative Analysis," *Al-'Adl* 14, no. 1 (2021), <https://doi.org/10.31332/aladl.v14i1.1925>.

¹⁰ Anak Agung Ayu Sinta Paramita Sari, "Pertanggungjawaban Pidana Dan Pemidanaan Terhadap Pelaku Pedofilia Dalam Hukum Pidana Indonesia," *Udayana Master Law Journal* 6, no. 1 (2017): 23–36, <https://doi.org/10.24843/JMHU.2017.v06.i01.p03>.

¹¹ Istiadah et al., "Strategies for Combating Sexual Harassment in Islamic Higher Education" 20, no. 2 (n.d.): 257–80, <https://doi.org/10.15408/ajis.v20i2.15412>.

¹² Fredrik Bondestam and Maja Lundqvist, "Sexual Harassment in Higher Education – a Systematic Review," *European Journal of Higher Education* 10, no. 4 (2020): 397–419, <https://doi.org/10.1080/21568235.2020.1729833>.

¹³ Muhammad Arifin, "The Efforts of Islamic Criminal Law Integration into Indonesian Law Procedures," *Budapest International Research and Critics Institute Journal* 3, no. 2 (2020): 975–84, <https://doi.org/10.33258/birci.v3i2.925>.

¹⁴ Marli Chandra, "The Penology of Islamic Criminal Law: Reintroduction of Islamic Penology," *AL-'Adalah* 15, no. 2 (2018): 345–66, <https://doi.org/10.24042/adalah.v15i2.2783>.

instructions and intent of the rules (*maqāshid shari'ah*) by trying to revitalize Islamic law itself.¹⁵ One of the forms of sanction in Islamic criminal law offered to ward off sexual crimes is the concept of *hudūd*.¹⁶ The realization of Islamic law requires a political approach,¹⁷ especially as crime continues to grow and penetrate cyberspace.¹⁸

Changes in regulations must be accompanied by an academic and socio-political approach. The legal situation governing sexual crimes in Indonesia is increasingly pitiful, and a change is needed. Changes that academic, especially students, provide input into legal development and changes. Therefore, the role and input of students in legal development can be a consideration in the future. However, students as heirs of a country must also study and develop their academics, including those involved in the legal field.

The focus of the research lies in the problem arises from the factors behind the emergence of the death penalty for sexual crimes in Indonesia in terms of the benefits and forms of benefit in the death penalty sanctions for perpetrators of sexual crimes. The data sources included observational research, interviews, and documentation as well as literature studies by reviewing documents relating to criminal sanctions for adultery, especially from the Criminal Code, outside the Criminal Code, and manuscripts of Islamic criminal law.

The *maslahah* theory used was the Al-Būtī version, which emphasized that the implementation of *al-'uqūbah al-Islāmiyah* was the prerogative of Allah SWT, with consideration and prioritizing the benefit of humans, as a form of absolute retribution to the perpetrator of the crime in accordance with the provisions contained in the text, and as a form of repentance for the perpetrator by imposing sanctions in Islamic criminal law. The data analysis in field research took place from the data collection process, which was carried out through four stages, namely reduction, verification of presentation, and drawing conclusions.

Some relevant literature reviews include article written by Supardin about efforts to reform criminal sanctions related to adultery that integrate culture, state, and spirit in Islamic criminal law, which is an alternative for

¹⁵ Mukti Tabrani, "Maqāshid Revitalization in Global Era: Istidlāl Study from Text to Context," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 2 (2018): 310, <https://doi.org/10.19105/al-ihkam.v13i2.1814>.

¹⁶ Junaidi Abdillah, "Diskursus Hudūd Dalam Studi Hukum Islam (Melacak Evolusi Rumusan Hudūd)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 2 (2018): 334, <https://doi.org/10.19105/al-ihkam.v13i2.1881>.

¹⁷ Desip Trinanda et al., "Maṣlahah and Justice in the Formulation of the Law: A Critic on the Formulation of Job Creation Law," *Jurnal Ilmu Syari'ah* 21, no. 1 (2022): 53–66.

¹⁸ Wahyuddin Naro et al., "Shariah Assessment Toward the Prosecution of Cybercrime in Indonesia," *International Journal of Criminology and Sociology* 9 (2020): 572–86, <https://doi.org/https://doi.org/10.6000/1929-4409.2020.09.5>.

renewing the Indonesian criminal law system in the future.¹⁹ An article published by Wardah Silwana Hikmah and friends about handling bisexual orientation.²⁰ In handling cases of bisexual orientation, the Indonesian legal system still experiences a legal vacuum. As a result, it seems as if it cannot be a direct legal argument because it does not have legal standing. There is not a single legal instrument in force that explicitly mentions this orientation case. Article written by Muhammad Arinal Huda about sexual crimes against children. Children have basic human rights.²¹ Society and the state still pay minimal attention to the legal protection of human rights for children. Indonesia as a legal state must be able to protect children's rights considering that children are the country's future assets whose rights must be protected. Many cases of sexual crimes against children are the result of a lack of attention from parents and a lack of respect for children's rights in society. An article written by Yogi Febriandi et al about women victims of sexual violence who told of their experiences of seeking justice by opposing the implementation of *Qanun Jinayat* in Aceh.²² It must be acknowledged that the Aceh *Qanun Jinayat*, which was originally implemented to eradicate sexual violence, turns out to have limitations in realizing the desired goals.

This study aimed to provide efforts to strengthen the law if changes to regulations occur, which must be accompanied by academic and socio-political approaches. The consideration of *maslahat* in changing the law, especially criminal cases, is a necessity that is difficult to avoid anymore. The rise of crime lately is due to the unequivocal criminal sanctions. *Maslahat* in existing criminal sanctions does not provide legal certainty and a sense of justice.

Discussion

The *Maslahah* and Death Penalty for Serious Sexual Crimes in Indonesia

The *maslahah* experiences development and evolution in meaning from one scholar to another. The development of the meaning of *maslahah*, both

¹⁹ Supardin Supardin and Abdul Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law: Alternatives in Indonesia's Positive Legal System Reform," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021): 913–27, <https://doi.org/http://dx.doi.org/10.22373/sjhk.v5i2.9353>.

²⁰ Warda Silwana Hikmah, Hasnan Bachtiar, and Kukuh Dwi Kurniawan, "Bisexual Orientation, Divorce, and Islamic Law in Indonesia: Legal Standing and Arguments," *Abkam: Jurnal Ilmu Syariah* 22, no. 1 (2022): 137–60, <https://doi.org/10.15408/ajis.v22i1.25791>.

²¹ Muhammad Arinal Huda, "Sexual Harassment in Indonesia: Problems and Challenges in Legal Protection," *Law Research Review Quarterly* 7, no. 3 (2021): 303–14, <https://doi.org/10.15294/lrrq.v7i3.48162>.

²² Yogi Febriandi, Muhammad Ansor, and Nursiti, "Seeking Justice through Qanun Jinayat: The Narratives of Female Victims of Sexual Violence in Aceh, Indonesia," *Qudus International Journal of Islamic Studies* 9, no. 1 (2021): 103–40, <https://doi.org/10.21043/QIJIS.V9I1.8029>.

etymologically and in terms of terminology, is important to pay attention to because it is the basis for understanding the meaning of *maslahah*. Etimologically, the word *maslahah* contains the meaning of benefit or interest, something that brings beneficial value, both material and non-material.²³ The theory of *maslahah* in its development cannot be separated from the discussion of *maqasid shari'ah*. In addition, *maslahah* and *maqasid shari'ah* can be said to have a very close relationship. Several Islamic legal theorists also say that *maqasid shari'ah* is an alternative statement for *masalih* or *maslahah*.

Maslahah has a universal meaning, while the details of *shara'* laws constitute the particularity of that *maslahah*.²⁴ To identify *maslahah*, which are religious goals, it must be limited by corridors. Through this corridor, *maslahah* can be identified and accommodated as legal propositions. The existence of Islamic criminal law cannot be separated from the noble ideals of maintaining natural order and realizing human *maslahah*. On that basis, Islamic criminal law places considerable emphasis on human benefit in every line of life. This is proven by making *maslahah* the axis and goal of Islamic law.²⁵

Islamic criminal law was created to lead humans to human *maslahah*, especially Islamic law, which is constructed from the teachings of the Qur'an and Sunah. Indonesia has an ideological foundation called *Pancasila* (The Five Principles).²⁶ The legal rules that apply in Indonesia are the Western legal system, customary law, and Islamic law,²⁷ and the laws of other religions also apply.²⁸ The Indonesian legal system is a legal system that recognizes the division between public law and private law. Public law includes legal regulations that regulate the power and authority of the ruler/state as well as the relationships between society and the state. Private Law includes legal

²³ 'Abd al-Hamid 'Ali Hamd Mahmud, "Al-Maslahah Al-Mursalah Wa Tatbiqatuhā Al-Mu'asirah Fi Al-Hukm Wa Al-Nuzm Al-Siyasiyyah," *Risalah 'Ilmiyah Universitas Al-Najah Al-Wataniyyah*, 2009, 25.

²⁴ Abd al-Wahab Khallaf, *Ilm Usul Al-Fiqh* (al-Haramain li al-Nashar wa al-Tawzi', 2004), P. 86.

²⁵ Dedy Wahyudin, "Mosque and Civilization : Setting Islamic Center of Nusa Tenggara Barat as Center of Civilization," *Nalar: Jurnal Peradaban Dan Pemikiran Islam* 4 (2020): 29–42, <https://doi.org/10.23971/njppi.v4i1.1921>.

²⁶ Agustya Catur Mahendra, "Ambiguity of Adultery Concept (Zina) in Criminal and Justice System (A Comparison between Indonesia, Pakistan, and Turkey)," *IJCLS (Indonesian Journal of Criminal Law Studies)* 4, no. 1 (2019): 93–106, <https://doi.org/10.15294/ijcls.v4i1.19614>.

²⁷ Ishak, "Analisis Hukum Islam Tentang Perbuatan Zina Dalam Pasal 284 Kitab Undang-Undang Hukum Pidana Dalam Pembaharuan Hukum Pidana," *Kanun: Jurnal Ilmu Hukum* 14, no. 1 (2012): 165–78, <https://doi.org/10.24815/kanun.v14i1.6205>.

²⁸ Fajar Nurhardianto, "Sistem Hukum Dan Posisi Hukum Indonesia," *Jurnal Teropong Aspirasi Politik Islam* 11, no. 1 (2015): 34–45, <https://doi.org/https://doi.org/10.24042/tps.v11i1.840>.

regulations that regulate relationships between individuals in meeting their daily needs.

Morality issues such as serious sexual crimes in terms of rape, sex slavery, forced prostitution, forced pregnancy, forced sterilization, and gender-based persecution can violate public and private law.²⁹ The essence of rape contained in the Criminal Code is too narrow, resulting in a sentence that seems light. The article on rape is regulated in Article 285 of the Criminal Code.³⁰

According to al-Būṭī, Islamic criminal law is a product of past law, which remains relevant to current developments. According to him, not all modern things are better than things from the past.³¹ Not a few modern things are a source of disaster and conversely, what is said to be ancient is a source of life. According to Abdul Qadir Audah, the aim of Islamic criminal law is not limited to providing a deterrent effect and efforts to prevent crime, but more than that to maintain the integrity of the harmony of community life and maintain public order as well as provide education about the importance of this law in society.³²

In Islamic criminal law, when referring to the Al-Qur'an and hadith, sexual crimes are classified into 2 very severe forms of sanctions, namely for those who are/have been married (*mubshah*) and for those who have never been married (*gair mubshah*). This classification influences the provision of different punishments between the two. *First*, the punishment for convicts who have never been married is being caned 100 times. In accordance with the instructions of the Al-Qur'an in surah al-Nur verse 2 as follows:

*“The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion [i.e., law] of Allāh, if you should believe in Allāh and the Last Day. And let a group of the believers witness their punishment.”*³³

Second, the punishment for convicts who are/have been married is stoning. According to the textual hadith of the Prophet Muhammad as follows:

²⁹ Abdul Syatar and Achmad Abubakar, *Filosofi 'Uqubah Islamiyah Versi Ramadhan Al-Buti; Relevansi Dengan Pemidanaan Dalam Sistem Hukum Indonesia* (Gowa: Alauddin University Press, 2020), p. 133.

³⁰ Mahendra, “Ambiguity of Adultery Concept (Zina) in Criminal and Justice System (A Comparison between Indonesia, Pakistan, and Turkey).”

³¹ Muhammad Sa'īd Ramadhan Al-Būṭī, *Al-Uqubat Al-Islamiyah; Wa 'Uqdah Al-Tanaqud Bainaha Wa Baina Ma Yusamma Bi Thabi'ibi Al-'Asbr* (Damaskus: Dar al-Fikr, 1999), p. 16.

³² 'Abdul Qadir 'Audah, *Al-Tasyri' Al-Jina'i Al-Islami; Muqaranan Bi Al-Qanun Al-Wadh'i, Jil. II, II* (Kairo: Maktabah al-Taufiqiyah, 2013).

³³ Kementerian Agama RI, *Al-Qur'an Dan Terjemabannya* (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Badan Litbang dan Diklat Kementerian Agama RI, 2019), <https://lajnah.kemenag.go.id/unduhuan/category/3-terjemah-al-qur-an-tahun-2019>.

*Men and virgins who commit adultery are bound a hundred times and exiled for a year, while widows and widowers who commit adultery are bound a hundred times and stoned”.*³⁴

From arguments above, the provision of very heavy sentences for perpetrators who are proven to have committed sexual crimes is due to a violation of the obligations and rights of other people to live and maintain their honor and chastity.³⁵

The main aim of criminal sanctions, which appear heavy and harsh, is to maintain and create benefits and protect people from things that are *mafsadah*. Islam as a religion of peace provides guidance and lessons to humans. These criminal sanctions are established to improve individual society and social order. Allah does not suffer harm if humans on earth commit crimes and does not benefit Allah if humans obey Him.

This criminal sanction has its basis, both from the Qur'an, hadith and the legislative body, which has the authority to determine punishment for the *takzīr jarimah*. The criminal sanctions are personal in nature and are imposed only on those who commit crimes. This is in accordance with the principle that "one person does not bear the sins of others". This punishment in general, applies to everyone because humans are equal before the law.

Al-Būṭī reveals the position of *maslahat* and its limits in Islamic law. Therefore, *maslahat* that comes out of these limits is not the real *maslahat* that deserves to be taken into consideration in determining the law.³⁶ Al-Būṭī believes that the *maslahah* agreed upon by most scholars about the permissibility of use is *maslahah mu'āshirah* and *maslahah mulā'imah*. *Maslahah munāsibah garibah* is a *maslahah* that cannot be used according to most scholars because the reference principle of its benefits is limited to conjecture (*wahm*) and is not included in *maqāshid shari'ah*. *Maslahah mursalah* is a *maslahat* that is not conjectural (*wahm*), but it is believed to be included in *maqāshid shari'ah* which is not contrary to religious provisions and there is no command or recommendation, and there is no prohibition to avoid it.³⁷

Al-Būṭī is of the view that *maslahat* is not an independent proposition like the Quran, sunnah, consensus (*ijmā'*), and *qiyās*. *Maslahat* is a universal value

³⁴ Abu al-Husain Muslim bin al-Hajjaj bin Muslim, *Shahih Muslim* (Beirut: Dar Ihya al-Turats al-'Arabi, 2010).

³⁵ Hamzah Hasan, "Implementasi Nilai-Nilai Kewajiban Asasi Manusia (Telaah Hukum Pidana Islam)," *Mazhabuna; Jurnal Perbandingan Mazhab* 2, no. 1 (2019): 92–119, <https://doi.org/10.24252/mh.v1i2.11650>.

³⁶ Muhammad Sa'īd Ramadhan Al-Būṭī, *Dawabit Al-Maslahah Fi Al-Syari'ah Al-Islamiyyah* (Damsyik: al-Maktabah al-Amawiyah, 2000), pp. 30.

³⁷ Al-Būṭī, *Al-'Uqubat Al-Islamiyyah; Wa 'Uqubat Al-Tanaqud Bainaha Wa Baina Ma Yusamma Bi Thabi'ih Al-'Asbr.*, pp. 32.

derived from the search and research of specific laws extracted from specific Sharia arguments.³⁸ When research is carried out on the law, one common point is found, namely the aim of realizing human benefit. The goal of realizing benefit is a universal value. These universal values cannot be realized independently of the existence of the law. The *maslahat* that can be considered as the real *maslahat* is that which is supported by sharia arguments or does not contradict religious arguments.

Based on this argument, *maslahat* has boundaries (*dhawābiṭ*) that limit the universal values from one side and can connect them with specific religious propositions from the other side. Thus, there is a harmonization between the universal values and the specific laws. Al-Būṭī is of the view that the purpose (*maqāshid*) of Islamic criminal sanctions is to ensure that every individual obtains rights related to prioritizing religion, protecting the soul, freedom of thought, continuity of offspring, and protection of property. Islam prescribes these sanctions, and no one has the right to change them.

The *Maslahah* and Criticism of Sexual Crime Regulations in Indonesia

In terms of its existence, there are articles in the Criminal Code, especially regarding the punishment for rape, which can be said to be no longer in accordance with current developments. The current Criminal Code is a product of Dutch colonial law. The Criminal Code is considered no longer in line with the spirit of reform which upholds the values of freedom, justice, independence, human rights, and democracy.

The point rape in the Criminal Code in article 285 is that a person is said to have committed adultery if one or both are married. Therefore, this is one of the reasons that it is less effective in suppressing the spread of adultery.

According to a lecturer, Arif Rahman (Interview, 11 February 2023), the articles in the Indonesian Criminal Code relating to adultery are ineffective due to the offense of complaining. In the sense that its ineffectiveness is not because it is not useful at all. At least the existence of punishments, even though they are very light, in the adultery articles can be a lesson for other people.

On the other hand, according to student, Fania (Interview, 12 February 2023), many cases of adultery that occur in Indonesia just do not enter the realm of law because they are not reported by their partners. However, the adultery article is at least able to suppress infidelity and maintain household harmony. Many couples don't have the heart to report their partner because they can always forgive. The adultery articles in the Criminal Code are sufficient to accommodate the interests of providing a sense of justice and legal certainty for couples, especially women. The solution to make the law regarding adultery more effective requires that legal knowledge regarding the adultery article must

³⁸ Al-Būṭī, *Dawabit Al-Maslahah Fi Al-Syari'ah Al-Islamiyyah*, pp. 32.

be part of the preparation before marriage. Therefore, the parties understand that there is protection for the status of the wife or husband if one of them commits adultery. The understanding of some people is that adultery will only be a reason for breaking up a marriage, but they do not think it can be punished.

According to Chaerul Risal (Interview, 13 February 2023), the weakness in Indonesian positive law regarding adultery is that it cannot be punished except for those who are married. Thus, there must be changes to legislative regulations. There is already a draft law regarding the prohibition of cohabitation, but it is still just a draft that has not yet been ratified.

The existence of Article 284 of the Criminal Code concerning adultery is no longer relevant and it cannot be said that this article is ideal as a legal product that guarantees the establishment of security and tranquility in people's lives as the legal objectives aspire to. In reality, the substance of Article 284 of the Criminal Code is unable to reflect and accommodate the legal values that exist in society, both customary law and religious law. However, the positive side is that Article 284 of the Criminal Code is at least the last bastion in handling cases of complaint offenses related to adultery.

The introduction of the death penalty for sexual crimes in Indonesia has several backgrounds that can be considered from a *maslahah* (benefit or public interest) perspective.³⁹ It is important to remember that benefit perspectives can differ between individuals and groups, so the following views only cover some of the considerations that may arise:

Community Protection: One of the main backgrounds is the protection of society from serious and detrimental sexual crimes. Sexual crimes, such as rape and sexual harassment, can cause deep physical and psychological trauma to victims. Imposing the death penalty can be seen as an effort to reduce sexual crimes by giving perpetrators harsher sentences.

Deterrent Effect: The death penalty is expected to create a stronger deterrent effect among potential perpetrators of sexual crimes. The threat of the death penalty can be a more effective deterrent than other punishments so that the potential for violations can be minimized.

Justice for Victims: Imposing the death penalty can be considered a form of justice for victims of sexual crimes because it provides appropriate punishment for serious acts that can damage the life and welfare of the victim.

Elimination of Dangerous Offenders: By imposing the death penalty on sex offenders who are particularly dangerous and likely to repeatedly commit similar acts, society can be protected from potential reoffending.

³⁹ Tongat Tongat, "The Ambiguous Authority of Living Law Application in New Indonesian Penal Code: Between Justice and the Rule of Law," *International Journal of Criminal Justice Sciences* 17, no. 2 (2022): 188–209, <https://doi.org/10.5281/zenodo.4756119>.

However, it should be remembered that there are also many considerations and controversies surrounding the death penalty, especially in the context of sexual crimes:

Deterrent Power: Not all research shows that the death penalty is significantly more effective in preventing crime than other harsh punishments. Some arguments state that the deterrent effect is not always proven in practice.

Legal System Errors: The criminal justice system is not always perfect and can lead to errors. Sentencing an innocent person to death is a huge and irreparable loss.

Human Rights: The death penalty is often criticized because it violates human rights, especially the right to life. Many countries and international institutions support the abolition of the death penalty.

Possible Reforms: Some supporters of the death penalty may prefer a better justice system rather than relying on the death penalty as the sole solution. Justice system reform that ensures the fairness and effectiveness of punishment could be an alternative.

Ultimately, considerations about whether the death penalty should be applied to sexual crimes are complex and must take into account a variety of factors, including ethical views, the effectiveness of punishment, and the protection of human rights.

Reforming Sexual Crime Sanctions with an Islamic Criminal Law Approach

In Islamic criminal law, some criminal sanctions have been determined (*muqaddarah*) and some have not been determined (*gair muqaddarah*).⁴⁰ Predetermined punishment is closely related to had punishment, which cannot be changed in form and measure. Meanwhile, the undetermined punishment is returned to the government authorities in a country, which is commonly known as *takzir*.

The *hudud* punishment for committing adultery and accusing another person of adultery (*al-qadzf*) aims to guarantee and protect a person's reproductive rights (*hijab al-nasl*). The stipulation of the Hadith law, such as 100 whippings for those who are not married and stoning for those who are married, has wisdom, namely maintaining the lineage and clarity of descent and showing that a Muslim's honor will not fall.

Adultery is the act of a sensible man inserting the tip of his genitals in one of the places, the front or the back of a woman who does not have a marital

⁴⁰ Supardin and Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law: Alternatives in Indonesia's Positive Legal System Reform."

relationship between the two. Abu Hanifah understands that adultery is only limited to the front. Adultery in Islamic law covers all unlawful sexual relations. There is no exception if one of the adulterous couples is unmarried or both are married,⁴¹ based on whether they are willing or not. If the act of adultery is proven to be punishable by adultery. That is the consistency of sanctions in Islamic criminal law.

The source of Islamic criminal law from the Qur'an and hadith has clear legal certainty to guarantee the lives of the wider community and maintain public order.⁴² The strength of Islamic criminal law lies in its source,⁴³ namely from revelation, giving rise to legal products that cannot be doubted.⁴⁴ Even though in the reality of national and state life it receives criticism and reproach from opposing circles.

Some groups are against enforcing Islamic criminal law, assuming that it is a phenomenon of decline and backwardness.⁴⁵ These groups see that several criminal laws have been determined to be cruel and barbaric. This is no longer appropriate to current modern and civilized conditions. In fact, some contemporary Muslim thinkers understand sharia as something that is developing and innovative, in the scope that arises from the objectives of sharia, and the boundaries of benefits that must be maintained and prioritized.

In general, in Islam, five priority things must be maintained under any circumstances. Namely, protecting religion (*hifẓ al-din*), protecting the soul (*hifẓ al-nafs*), protecting offspring (*hifẓ al-nasl*), protecting reason (*hifẓ al-aql*) and protecting property (*hifẓ al-mal*). Severe sanctions for adultery for the sake of existence protect offspring from being mixed up with violations of morality.

Criticism of Islamic criminal law towards article 284 of the Criminal Code, which views that the act of adultery is a married man or woman committing adultery. This element is less supportive because it opens very wide

⁴¹ Noercholis Rafid. A, Muhammad Fajri, and Khairun Nizam Mohd. Noor, "Masalah Evaluation of Judges' Sentences for Domestic Violence Crimes at the Majene District Court," *Mazhabuna: Jurnal Perbandingan Mazhab* 5, no. 1 (2023): 57–78, <https://doi.org/10.24252/mh.vi.37034>.

⁴² Abdi Wijaya and Riska, "An Evaluation of Marriage Dowry Using Digital Money from the Perspective of the Four Madhhabs," *PAREWA SARAQ: Journal of Islamic Law and Fatwa Review* 1, no. 1 (2022): 48–58, <https://ejournal.sulselmui.com/index.php/PS/article/view/5>.

⁴³ Kasjim Salenda, Ahmad Fauzan, and Muhammad Nafi, "The Call of Jihad in Adding the Adhan Narrative to the Perspective of Islamic Law," *Pappaseng: International Journal of Islamic Literacy and Society* 1, no. 2 (2022): 58–68, <https://doi.org/10.56440/pijils.v1i2.9>.

⁴⁴ Fauzan, "Alternatives to Criminal Conviction in a Comparative Analysis of Positive Law and Islamic Criminal Law," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 1 (2022): 183–202, <https://doi.org/10.29240/jhi.v7i1.4308>.

⁴⁵ Abdull Syatar et al., "Consequences for Counterfeiting and Distributing of Counterfeit Vaccines under Jinayah and Criminal Law: A Comparative Study," *Al-Manahij: Jurnal Kajian Hukum Islam* 17, no. 1 (2023): 1–12, <https://doi.org/10.24090/mnh.v17i1.7654>.

space and opportunities for the spread of the crime of adultery in various forms and variations. Other considerations include mixed lineage, transmission of venereal disease, disrupting household harmony, giving rise to injustice towards the child produced, and impact on the state if the child is neglected. Thus, the light punishment in Article 284 of the Criminal Code, namely a maximum of 9 months in prison, is ignored by some people. Apart from violating legal and religious norms, it also violates local Indonesian cultural norms.

According to Muhammad Alif (Interview, 15 February 2023) as a student, the heavy sanctions in Islamic criminal law related to sexual crimes not only protect human rights but also provide priority so that human obligations are prioritized as well. This means that one human being and another must have an obligation to maintain order in society at large.

The criminal form of adultery in Islam is not always beating 100 times and stoning. Both sentences are decided by the trial court judge if the evidence meets the elements such as having to have 4 male witnesses testifying in court. However, if the elements are not met, the adulterer can be charged with a tax return which is returned by the government judge in a country.

The consideration of the benefits contained in Islamic criminal law can be used as a recommendation in updating Positive criminal law with its legal material. The benefits of this basic matter must be maintained seriously, one way is to consider the spirit contained in Islamic criminal law, even if it is not yet possible to implement it in its entirety. These basic things are urgent needs (*dharūri*) in human life and a humane society, if these needs are disturbed it can endanger the continuity of human life.

Conclusion

The consideration of *maslahat* in strengthening criminal law in Indonesia, particularly regarding sexual crimes, is indeed crucial. *Maslahat* necessitates prioritizing the protection of society from serious and harmful sexual crimes. Such crimes, including rape and sexual harassment, can inflict deep physical and psychological trauma on victims, impacting their lives and well-being significantly. The provision of the death penalty is seen as an effort to deter potential perpetrators from committing sexual crimes. The threat of the death penalty is believed to serve as a stronger deterrent compared to other punishments, thereby minimizing the potential for violations. The imposition of the death penalty on dangerous sex offenders, particularly those who exhibit a propensity to re-offend, aims to protect the community from the potential risks posed by such individuals.

The decision to apply the death penalty for sexual crimes involves considerations of *maslahat*, as well as social, cultural, and legal values. It's essential to navigate this complex debate while considering various factors to

ensure that legal reforms align with societal norms and values. There's a recognition of the need to reform adultery punishment in line with the nation's culture. Islamic punishment offers an alternative perspective, considering broader aspects of benefit and cultural relevance. Embracing the spirit of adultery sanction within Islamic punishment can serve as an alternative for renewing the Indonesian criminal law system in the future. While it may not align with the expectations of all segments of society, it aims to provide strong legal certainty and uphold the sustainability of human life. The consideration of *maslahat* is vital in shaping criminal law policies, particularly concerning sexual crimes, and requires a balanced approach that takes into account societal values, justice for victims, deterrence, and protection of the community

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