

Comparative Analysis of the Crime of Overspel (Adultery) in the Articles of the New Criminal Code and the Old Criminal Code Related to Adultery

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ABSTRACT

Law in Indonesia is still largely influenced by Dutch law, both in terms of legal logic, legal concepts and theories. One of them is the regulation of the crime of adultery which is regulated by Article 284 of the Criminal Code. This setting is considered no longer relevant so it must be updated. The Criminal Code has reformed articles that are no longer in accordance with Indonesian culture. one of which is Article 411 concerning adultery which has been adapted to the norms and culture that apply in Indonesia. The problem taken from this research is a comparative analysis of the crime of overspel (adultery) in the articles of the new criminal code and the old criminal code related to adultery. The research method used in this research is Normative Juridical with the approach used being a statutory approach by analyzing the provisions contained in Articles 284 of the Criminal Code and 411 of the Criminal Code, research sources namely by law, secondary legal sources with scientific articles and books, tertiary book materials with dictionaries. The method of collecting legal materials with reference sources related to research, and the method of analyzing legal materials by understanding and reviewing the data collected. The results of the research concluded that the aim of updating the adultery article in the Criminal Code includes a value reorientation that attempts to accommodate the Indonesian value system in the offenses of adultery and cohabitation in the Criminal Code whose philosophy is in the form of safeguarding and respecting the institution/institutions of marriage, lineage, and upholding the values of marriage. moral values contained in Indonesian society. The aim of this research is to find out the comparison of the adultery article in article 284 of the old Criminal Code. and article 411 of the new Criminal Code. The changes to the adultery article in the Criminal Code are in accordance with the culture and norms that apply in Indonesia.

Keywords: criminal law, reform of the Criminal Code, adultery

INTRODUCTION

Indonesia is a rule of law state as stated in article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (Subarjo & Widodo, 2020). The aim of the rule of law is to create security, order, justice and prosperity for citizens so as to create harmony and balance for society in accordance with the values contained in Pancasila as part of social life (Yuniarto et al., 2023).

Law in Indonesia is still largely influenced by Dutch law, both in terms of legal logic, legal concepts and theories (Isra et al., 2017). One of them is the enactment of the Dutch inheritance criminal law called *wetboek van strafrecht voor nederlandsch-indie* or what is known as the criminal code (KUHP) (Silfiah et al., 2024). Most of the regulations contained in the Criminal Code still use translations from Dutch, which means

that they clearly do not reflect the culture and moral values of Indonesian society (Yasir et al., 2021). Likewise with the regulations regarding adultery that are regulated therein. In the Criminal Code there are regulations regarding the crime of adultery which are regulated in article 284 of the Criminal Code (Rezky & Haris, 2018). However, the adultery article is considered to be no longer relevant to the values and morals contained in Indonesian society, so the Indonesian Criminal Code requires reform that is in line with the development of values in society (Rezky & Haris, 2018). In article 284 of the old Criminal Code, adultery, which is one of the crimes of morality, explains that adultery can only be punished if the perpetrator is married, or has been bound by marriage and is subject to article 27 BW and is a complaint offense (Mahendra, 2019). Meanwhile, the act of adultery is a crime that damages the morals of not only adults bound by marriage but also occurs among teenagers. Adultery is a heinous crime that is destructive (Gallafent, 2018).

The impact of adultery is not only on individuals but also on society. Therefore, criminal law in Indonesia requires reform that is in accordance with the moral values contained in Indonesian society (Astuti & Raharjo, 2017). So, a review of the adultery article will be carried out and it will be aligned with values that do not conflict with the religious values held by Indonesian society. And, from this discussion we can see that it is appropriate for Indonesia to bring about reforms regarding the articles in the Criminal Code, one of which is the article on adultery which has been adapted to the norms and culture that apply in Indonesia. However, with the legalization of Law Number 1 of 2023, there are pros and cons in it. Some people believe that adultery between single couples or couples who are not married cannot be punished because some people think that this has violated or taken away and is considered to have injured the freedom of life or violated every human being's right to privacy in the form of individual freedom. If the government is too overbearing in entering the realm of privacy, it is feared that there will be chaos in society and vigilantism will occur (Sidang, 2020).

Some people are of the view that the state is considered to be going too far in interfering in the realm of individual privacy. And if law enforcers want to carry out and carry out their duties in order to uphold the law, they should not carry out raids, because that would be a violation of the community's right to privacy. Meanwhile, in fact, adultery has spread among society, whether it is committed by some teenagers or adults, which means that adultery does not only occur among adults. This is proven by the large number of applications for young marriage dispensation due to pre-pregnancy reasons. This happens because of the lightness of the criminal sanctions imposed, namely sanctions with a maximum of 1 (one) year in prison, this clearly does not have a deterrent effect for the perpetrators of adultery. The act of adultery is certainly contrary to the moral and cultural values of Indonesian society, the majority of whom are religious, whose religion certainly prohibits sexual intercourse before being bound by marriage.

If in the old Criminal Code regarding adultery the context was still limited, one of which was Article 284 which reads "*A married man commits gendak (adultery with his girlfriend/other woman), even though he knows that Article 27 BW applies to him; and A woman participates in this act even though she knows that the man is guilty and Article 27 BW applies to the man.*

In this case, no prosecution will be carried out if there is no complaint from the husband/wife who feels their name has been tarnished, if article 27 BW applies to them, within the three month deadline according to the request for divorce, separate tables and beds for reasons of this mistake. In this complaint, articles 72, 72, and 75 do not apply. A complaint can be withdrawn if the trial of the case has not yet begun. If the husband and wife apply article 27 BW, the complaint is not processed because the

divorce status of the marriage is not yet known or the decision to separate the table and bed is not yet known.

The article states, " *every person who has sexual intercourse with someone who is not their husband or wife will be sentenced to imprisonment for a maximum of 1 (one) year or a fine of 10,000,000.00 (ten million rupiah)*. The article above means that only married couples, whether male or female, can be subject to criminal sanctions if they have sexual intercourse with someone who is not their husband or wife. Meanwhile, in the New Law, Law Number 1 of 2023, the Criminal Code in Article 411 paragraph 1 of Law No. 1 of 2023 regulates more broadly the act of adultery, namely " *any person who has sexual intercourse with someone who is not their husband or wife, will be punished for adultery, with a maximum imprisonment of 1 year or a maximum fine of category II.*" In the new Criminal Code there is no provision for perpetrators of adultery who are bound or not bound by marriage, both of whom can be subject to criminal sanctions. One of the lecturers at the Faculty of Law, Faculty of Law, Muhammadiyah University, Jakarta, Chairul Huda, is of the view that in the Dutch colonial code, adultery is only for people bound by marriage, whereas Law No. 1 of 2023 regulates adultery broadly. Some members of the public are of the view that the regulations in the old Criminal Code are considered to normalize the act of adultery, so it is necessary to carry out a review of the adultery article. With the ratification of the Criminal Code Bill in December 2022 by the House of Representatives (DPR) and the government becoming law, it brought changes to several articles, especially in the article on adultery, although this ratification was accompanied by pros and cons for some people. The differences between the articles between the new Criminal Code and the old Criminal Code have several changes. This is certainly very interesting to do research.

The main aim of this research, based on the proposed problem formulation, is to identify two main things. First, to explore the urgency that drives the need for changes to the adultery article in the old Criminal Code. Second, to analyze the comparison regarding the treatment of adultery in the old Criminal Code and the new Criminal Code from the social and cultural perspective of Indonesian society. Apart from these two main objectives, this research is also expected to provide significant benefits. The benefits include increasing the author's insight into the reasons for the need to update the old Criminal Code regarding adultery. For the public, it is hoped that this research can increase understanding of the application of law in Indonesia, especially related to the crime of adultery and the sanctions that apply in accordance with existing laws and regulations. For the government, it is hoped that this research can provide scientific input to the MPR, DPR and government to ensure the creation of laws that are in accordance with the 1945 Constitution of the Republic of Indonesia. Apart from that, this research is also directed at fulfilling the academic requirements for obtaining a degree. Bachelor of Laws (Bachelor of Law). For readers, the results of this research can be used as a source of knowledge, comparison and reference for comparative studies between adultery articles in the old Criminal Code and the new Criminal Code.

RESEARCH METHODS

This type of research is normative legal research, which is also known as doctrinal research, which is carried out by examining library materials or secondary data. According to Soerjono Soekanto (2015) and Amiruddin and H. Zainal Asikin (2016), in this research law is often conceptualized as what is written in statutory regulations or as rules and norms that serve as a reference for human behavior that is considered appropriate. Peter Mahmud Marzuki (2017) explains that normative legal research is a process of discovering legal rules, legal principles and legal doctrines to answer the legal

issues faced. This research uses a normative juridical approach using literature and document studies related to Law no. 1 of 1946 and Law no. 1 of 2023 in a comparative analysis regarding articles 284 and article 411 concerning adultery. The main source of legal materials consists of primary legal materials such as the 1946 Criminal Code Law and the 2023 Criminal Code, as well as secondary legal materials in the form of scientific journals, articles and legal expert opinions taken from related books (Ediwarman, 2011). The data collection method was carried out through literature study using primary, secondary and tertiary legal materials to ensure that the research results could be justified academically. Data analysis was carried out qualitatively by processing all the legal materials collected to find patterns and conclusions that were relevant to the legal problems being studied.

RESULTS AND DISCUSSION

A. What is the urgency of the need for reform of the Criminal Code in the dynamics of Indonesian society regarding the adultery article?

Approximately a century of the implementation of the Dutch inherited criminal law called *wetboek van strafrecht voor nederlandsch-indie* or what is known as the criminal law book (KUHP), is quite a long time to see, understand and explore the weaknesses and strengths of its implementation Criminal Code. The increasing complexity of criminal law problems that must be handled as well as international instruments that inspire criminal law enforcement (Bantekas & Mylonaki, 2014). In some cases, it is felt that the Criminal Code is starting to become irrelevant to the aspirations and demands of the community (Morris, 2016). Efforts to reform the law in Indonesia began seventy-seven years ago, to be precise since 1963 or 59 years ago and were ratified on December 6, 2022. The Criminal Code will come into effect 3 years after its promulgation. This clearly cannot be separated from the foundation and national goals to be achieved as formulated in the Preamble to the 1945 Constitution of the Republic of Indonesia, especially the fourth paragraph, namely:

"Then, to form the government of the Republic of Indonesia which protects the entire Indonesian nation and all of Indonesia's blood and to promote general welfare, educate the life of the nation, and participate in implementing world order based on independence, eternal peace and social justice, then the Indonesian National Independence was followed." This is in a Constitution of the State of Indonesia which is formed in the structure of the Republic of Indonesia which is the sovereignty of the people based on the belief in the Almighty God, Just and Civilized Humanity, the Unity of Indonesia and the People which is Guided by Wisdom in Deliberation/Representation, and with Realizing Social Justice for All Indonesian People."

From the formulation of the fourth paragraph, the national objectives contained in the 1945 Constitution of the Republic of Indonesia have two national objectives, namely (1) To protect the entire Indonesian nation, and (2). To promote general welfare based on Pancasila. This means that there are two national goals, namely "social defense" and "social welfare" which shows the existence of the principle of balance in national development goals. Thus, the two goals that criminal law and criminal law want to achieve as a means of criminal politics are "protection of society". According to Cherif Bassiouni, the aim of protecting society is the cornerstone of criminal law. If starting from the national goal, namely "protection of society" or "social defence", then the aim of criminal law enforcement according to Barda Nawawi Arief is: Society needs protection against anti-social acts that are detrimental and endanger society. Starting from this aspect, the aim of punishment (criminal law enforcement) is to prevent and overcome

crime. Society needs protection against the dangerous nature of a person. Therefore, crime/criminal law aims to improve the perpetrator of the crime or try to change and influence his behavior so that he returns to obeying the law and becoming a good and useful citizen of society.

If you look at the description above, there are articles in the Criminal Code that are no longer relevant to the aspirations and demands of the people and the needs of the Indonesian people. Currently the Criminal Code in use is a Dutch product that is heavily influenced by Western culture. This is considered to have no similarities in culture, religion and customs which are deeply rooted in Indonesian social life. The culture in Indonesian society is very different from western culture, including the habits that occur in Indonesian society. If the scope of language is further expanded, the culture found in Indonesian society is based on four norms that apply in Indonesia. The first norm is the norm of politeness, where Indonesian society upholds the norm of politeness towards anyone, whether younger or older. For example, let's take it from Central Java. The people in Central Java have a hierarchy of grammar that is used in communication so that a sense of respect arises for the person we are talking to. Then, secondly, namely moral norms, these norms are based on human conscience in distinguishing between what is good and what is not bad, for example **cohabitation** is an act that is not in accordance with the norms of decency and culture of Indonesian society. The third is divine norms, many Indonesian cultures are based on divine norms, for example we can see in the Acehnese people who use Islamic law among their people. And the fourth is legal norms. Culture in Indonesia must be in harmony with legal norms so that there are cultural boundaries that conflict with the law or not, which aims to maintain the values contained in the norms themselves.

Along with the modernization of cultural or social cultural developments that are currently occurring in society, several articles in the Criminal Code have been found that are no longer relevant to the cultural situation of society in Indonesia. Several articles in the Criminal Code are considered controversial and deviant and must be reviewed. The review aims to change articles that are no longer in accordance with the culture internalized in Indonesian society. Reform in the field of criminal law, not only builds legal institutions, but must also include the development of the substance of legal products which are the result of a legal system in criminal law regulations and which are cultural in nature, namely the attitudes and values that influence enactment of the law.

In the changes to the new Criminal Code which is in the spotlight both in Indonesia and internationally. From the discussion until the decision was made, the approval of the Draft Criminal Code (RKUHP) to become law continued to attract public attention. It is even said that it will hamper the investment climate. Various criticisms of a number of crucial issues including the offense of adultery. The regulation of the offense of adultery in the new criminal code (KUHP) has indeed undergone reformulation compared to the Dutch colonial Criminal Code. Researcher at the Legal Research Center of the National Research and Innovation Agency (BRIN), Budi Suhariyanto, said that the colonial Criminal Code regulates the offense of adultery by limiting one party to marriage. For example, a husband or wife commits adultery with someone other than their legal partner.

Meanwhile, the offense of adultery is regulated in Article 411 of the Criminal Code which has just undergone a redefinition of adultery. In the new Criminal Code, the offense of adultery is an absolute complaint offense, namely a husband or wife who is bound by marriage; parents or children who are not married. This means that not all parties can make a complaint about the offense of adultery. Budi Suhariyanto, in a discussion entitled "Pros and Cons of the Criminal Code, stated that the new Criminal

Code's offense of adultery also targets perpetrators who are not married," further explained that the offense of absolute complaint is a limitation on parties who have the right to make a complaint or report to law enforcement officials. . In Budi Suharyanto's view, the regulation of the offense of adultery in the new Criminal Code is a middle way, neither too conservative nor too liberal. Even though there is a report or complaint, for example, it turns out there is still an opportunity for the report to be withdrawn as long as the case has not been examined in court.

This means that the new Criminal Code still provides the opportunity to continue the private life of husband and wife as long as there is regret, internal realization and kinship so that they can return to living a harmonious life. Budi Suharyanto also provided views on the regulation of criminal acts of cohabitation (living together without marriage) or cohabitation. Cohabitation arrangements in the new Criminal Code are something new as regulated in Article 412 of the Criminal Code. The colonial Criminal Code does not regulate cohabitation, so couples who are not married and live together cannot be criminalized. However, in the new Criminal Code regulations, this is considered a criminal offense. The threat of a maximum prison sentence of 6 months for those who violate the rules prohibiting cohabitation.

Similar to the offense of adultery, cohabitation is an absolute complaint offense. As long as there are no complaints, cohabitants cannot be prosecuted. The parties who have the right to make a complaint about cohabitation are the husband or wife who is bound by marriage, and the parents or children who are not bound by marriage. However, there is still the opportunity to withdraw a complaint or report as long as it has not yet been examined at trial.

The regulations in the cohabitation article absorb the social, cultural and religious realizations found in Indonesian society. Indonesian culture tends to view living together without marriage as a wrong and disgraceful act. Because of this, the new Criminal Code tries to criminalize the act of cohabitation.

However, this article becomes controversial when compared with people in other countries who have a culture and view of privacy values regarding protected sexual rights. This is normal because there are differences in cultural dimensions and values held by society. In the new Criminal Code there is a reorientation of values which tries to accommodate the Indonesian value system in the offenses of adultery and cohabitation in the new Criminal Code whose philosophy is in the form of safeguarding and respecting the institution/institutions of marriage and lineage. This is different from the colonial Criminal Code with the colonial value system at that time. If there are no arrangements, there is a worry that the line will not continue and someone will be harmed in the future. The reformulation of adultery and cohabitation articles in the new Criminal Code does not always have to accommodate modern laws from developed countries. Legal experts will first conduct a study whether modern laws from developed countries are in accordance with the values and culture of Indonesian society or vice versa. The legislators considered that there was a need to reorient the development of legal values that live and develop in society to be accommodated in the reform of the Criminal Code.

Meanwhile, Jentera Indonesian Law School (STHI) lecturer, Bivitri Susanti, believes that the offenses of adultery and cohabitation are good provisions in the new Criminal Code. Because, people who commit adultery or cohabitation cannot immediately be complained or reported to law enforcement officials. However, in implementation in the field, Bivitri estimates that it will cause various problems.

For example, if someone is reported to have committed an offense of adultery and is prosecuted first. However, it was later discovered that prosecution could not be

carried out because the complainant was not the family member who had the right to make a complaint. Meanwhile, the person who was reported to have become a suspect, he argued. That means there are problems in implementing this regulation. He further added that these two levels must be studied first, so as to ensure implementation of this rule. Due to its absolute character and must be removed from the modern Criminal Code, in order to achieve legal certainty.

The criminalization of the crime of adultery in the current Criminal Code (KUHP), regarding adultery is regulated and included in the fourth chapter which regulates crimes against morality in the Criminal Code. Meanwhile, provisions regarding adultery are regulated in Article 411 of the Criminal Code. Regarding this article, R. Soesilo explained that what is meant by Zina is *sexual intercourse committed by a man or woman who is married to a woman or man who is not his wife or husband*. In order for this article to fall into place, sexual intercourse must be carried out consensually, there must be no coercion from either party. So if we refer to the current provisions of the Criminal Code, there are 4 (four conditions) for a person to be declared to have committed adultery, namely: having sexual intercourse with a woman or man who is not her husband or wife. (This person does not have to be married) he is not subject to Article 27 of the Civil Code; the partner who engages in sexual intercourse is subject to Article 27 of the Civil Code, knowing that the partner who engages in sexual intercourse is married, and the provisions of Article 27 of the Civil Code apply to the partner who engages in sexual intercourse.

If we look closely, the adultery provisions in the current Criminal Code aim to criminalize perpetrators of adultery where one or both of the perpetrators of sexual intercourse are people who are already tied to a previous marriage. Apart from that, Article 284 of the Criminal Code is an absolute complaint offense which does not allow the act to be punished. If there is no complaint from the injured party (husband or wife who was betrayed by their partner) and, as long as the case has not been examined before the court. then the complaint can always be withdrawn

Apart from that, the determination of the offense of adultery as an absolute complaint offense does not support the aim of preventing criminal acts, as if it provides an opportunity for someone (especially a husband) to feel free to commit adultery. Especially in a society where most wives' positions are weaker than their husbands, because they still depend more on their husbands' positions. Then, by making adultery an absolute complaint offense, it can result in other offenses occurring, such as prostitution, women trafficking, abortion, and so on. The existence of the world of prostitution can result in opportunities for dirty diseases that endanger society, namely HIV/AIDS. This means that the policy of determining the offense of adultery as a complaint offense deserves to be reviewed.

Based on the punishment, the Criminal Code places the offense of adultery as a light offense. The Criminal Code punishes adultery perpetrators with a maximum prison sentence of nine months. Providing very light criminal sanctions for crimes that society considers serious and dangerous will hurt the sense of social justice, so that people do not feel protected by the law, which on other occasions will give rise to distrust of the law and will ultimately trigger vigilantism.

The provisions regarding adultery have also undergone very drastic changes when compared to the provisions of the colonial Criminal Code. Where there is an expansion of the meaning of the crime of adultery itself in article 411 of the Criminal Code. In the new Criminal Code or Indonesian Criminal Code, the crime of adultery is regulated in Article 411 points (1) to (4). The article itself reads:

Article 411 Convicted of adultery, with a maximum imprisonment of 1 (one) year and a category II fine. If anyone has sexual intercourse with someone who is not their husband or wife. Criminal acts as referred to in paragraph (1) are not prosecuted except upon complaints from husbands, wives, or parents or children for people who are not married. The provisions of Article 25, Article 26 and Article 30 do not apply to complaints as intended in paragraph (2). The complaint can be withdrawn as long as the examination in court has not yet begun.

When referring to the provisions on adultery in Article 411 points (1) to (4) of the Criminal Code, it can be concluded that the act of adultery is an act of sexual intercourse committed by two people who are not bound by a legal marriage bond, whether one or both parties are bound by a marriage bond. previous marriage or both of them have not been tied to a marriage bond. There appears to be a very broad expansion of meaning in this new offense. If we refer to the provisions of the Criminal Code which are still in force now where adultery only applies to perpetrators where one or both of the perpetrators of sexual intercourse are people who have been bound by a previous marriage, compared to the current provisions where anyone who commits acts of sexual intercourse without a marriage bond is can legally be sentenced to an offense. After looking at and observing the contents of Article 411 numbers (1) to (4) of the Criminal Code, it can be concluded that the law has over-criminalized all perpetrators of sexual intercourse who are not bound by marriage to become the crime of adultery. In this case, the offense of adultery in the Criminal Code has gone too far in regulating citizens' private and personal affairs into public affairs.

Apart from that, the criminal provisions for criminal acts of adultery in the new Criminal Code have also increased the period of imprisonment which in the colonial Criminal Code was only 9 (nine) months. In contrast to the Indonesian Criminal Code, the imprisonment period has been increased by 3 months to 1 (one) year. It is hoped that the additional prison period will provide a deterrent to perpetrators of adultery. Meanwhile, Article 412, which regulates living together or what is often called cohabitation, is subject to a penalty of 6 (six) months or a maximum penalty of category II. In articles 411 and 412, the public believes that the government has gone too far in regulating the personal sphere, so we can see together that the makers of this law are seen as having overcriminalized it here. We all need to know that this offense is included in the category of complaint offense so it cannot be punished if there is no complaint from the parties who feel they have been harmed. This regulation aims to uphold the moral values contained in Indonesian society regarding marriage.

B. Elements in Efforts to Prevent and Handle Criminalization

Crime of Adultery

In society and state life, we get legal protection from the government as citizens, therefore the government must strive to provide legal protection and legal certainty for crime victims. And because of that, the government needs a lot of involvement from all parties in order to achieve legal protection for the community, because it is an absolute right that must be obtained by all people. So that the government does not act alone in carrying out legal protection.

In order for legal protection to be implemented well, the government must work with many parties as well as government institutions assigned by the government as an institution that specifically handles victims of these crimes and there is also a need for cooperation with the wider community. The involvement of the wider community here is to play a role and help with recovery and provide a sense of security for the community who are victims of these crimes.

Before entering into the next discussion, we should understand the state itself, where the state is a territorial unit within which there are various kinds of relationships between individuals or groups of people. The government with the authority granted by the state is given the task of organizing the population in its territory, so that the state can provide protection and fulfill the interests of its population, so that the role of the community itself is often represented by social institutions that give special attention to victims of immoral crimes. .

A. The following elements of government institutions that are directly involved in handling crime victims include:

1. The police

Every country has various problems that arise, therefore every country needs the role of the police as a law enforcement agency which is a place or forum for dealing with criminal acts in accordance with the capacity and authority of the police, so it is often said that the police is the main and first investigator in every handling of a crime. The role of the police as law enforcement officers who are the first to be faced with a crime case certainly requires special skills and expertise to deal with crimes which are increasingly developing day by day the types of crimes and the methods used by criminals in their lives, so that the need for services provided to the community. In this case, efforts to provide legal protection, a sense of security and comfort can be maximized in its implementation so that professionalism can be achieved in carrying out the duties of a police officer.

As for the problems faced by the police, it is regulated in SK Pengab no. 11 / p / III / 1984, where one of the duties of the police is to provide legal protection and services to the community for the enforcement of legislation, so that violations do not occur or minimize -violations committed by criminals.

2. prosecutor

Prosecutors in carrying out their obligations are very dependent on the Investigation Report (BAP) submitted by the police, in this case by investigators, so after a case has been investigated by the police, then the police will make a BAP which will then be submitted to the prosecutor's office, and if (Prosecutor) believes that from the results of the investigation carried out by the police a prosecution can be carried out, the public prosecutor will immediately prepare an indictment as regulated in article 140 paragraph (1) of the Criminal Procedure Code, in this article it is assumed that the public prosecutor is of the opinion that from the results of the investigation it can be carried out the prosecution shall prepare an indictment as soon as possible.

If the prosecutor has made an indictment, then delegates the case to the court which has the authority to try which, as regulated in article 143 (1) of the Criminal Procedure Code, is the public prosecutor.

3. Judge

In a legal state there are rules and sanctions, where if there is a violation committed by the community or certain installations, the government will receive treatment to achieve justice. In the Indonesian judiciary, the existence of judges has an important role, because a judge decides a problem that arises, so a judge must be fair to anyone without taking sides, so that social justice will be achieved where the aim of the judiciary itself is to create justice in the community environment.

Article 1 point 8 of the Criminal Code explains that judges are state judicial officials who are given the authority by law to adjudicate. A judge in his duty

to judge acts autonomously, independently, freely without any intervention from other parties, this independence is guaranteed by law number 14 of 1970 concerning the main provisions of judicial power, namely in article 4 paragraph (3), it is said that "any interference in judicial matters by other parties outside the jurisdiction of the judiciary is prohibited" in this way it is hoped that truly fair justice will be achieved which is felt by each party in the sense of being fair to the community and fair to the judge himself.

B. Reform of the criminal law on the crime of adultery so that the act becomes a cause of over-criminality

A country definitely has the ideal law or *ius constituentium* to be able to facilitate development in society. *Ius constituendum* can be expected to provide legal certainty to society after it becomes *ius constitutum* later. Indonesia also needs *ius constituendum*, including in Indonesian criminal law which is regulated in *wetboek van strafrecht* which is a legacy from the Dutch whose content is no longer in accordance with the development of Indonesian society, so a criminal law is needed that can regulate it in accordance with the development of Indonesian society.

In his view, Barda Nawawai Arief believes that criminal law reform is essentially a way of reviewing and reforming (reorienting and reforming) criminal law which is in line with the central socio-political, socio-philosophical and socio-cultural values of Indonesian society. underlies all social policies, criminal policies and law enforcement policies in Indonesia. He emphasized that criminal law reform should be implemented with an approach that leads to policy and value orientation.

In the 2023 Criminal Code regulations, adultery is regulated in Article 411, in which article the penalty for committing adultery is a maximum imprisonment of 1 (one) year. If in Article 284 of the Criminal Code which is currently in force a person is deemed to have committed the crime of adultery, namely if one of them is married, in Article 411 paragraph (1) of the 2023 Criminal Code it is added that the act that can be said to be adultery is between a man and a woman, each of whom not legally bound by marriage to have sexual intercourse. Article 284 of the Criminal Code stipulates that adultery is a complaint offense, and the person who has the right to make a complaint is based on the complaint of the husband/wife who feels aggrieved or contaminated. In the 2023 Criminal Code, the crime of adultery is still included in the offense of making a complaint, but the person who has the right to make a complaint is based on a complaint from the husband, wife, or a third party who has the right to make a complaint, namely parents or children for those who are not married.

Based on the description above, we can see that in the new Criminal Code regulations there is an expansion of the regulations regarding the offense of adultery. In the 2023 Criminal Code Regulations, men and women who are bound by a marriage, or who are not bound by a marriage, can be threatened with criminal charges, with the nature of the offense still being a complaint offense. Article 411 of the 2023 Criminal Code Regulations regulates the crime of adultery, without making a distinction between those who are married and those who are not married. Likewise, it is not differentiated between men and women who commit the crime. By expanding the definition of this offense, it is aimed at showing respect for the values of marriage in Indonesia. Apart from the anxiety felt by the people in Indonesia, the expansion of the crime of adultery is also worried by tourists who want to visit Indonesia, so what are the differences

between the adultery laws in Indonesia and several foreign countries? Here are the differences:

1. In Turkey, the act of adultery is not a criminal act, this is based on Turkey's secular ideology and views that sexual relations are a private area, however adultery can be a cause or be used as a reason for filing for divorce, but for adulterers who have not or are not bound marriage then, the act of adultery committed does not have any impact or risk.

The problem of adultery in law in Indonesia and in Turkey has fundamental and fundamental differences, in Indonesia the act of adultery is specifically regulated in Articles 284, 287 and 288 of the Criminal Code, but at a practical level there are limitations, namely the act of adultery is a complaint offense, the consequence is that there are complaints from parties who feel disadvantaged, besides that these articles cannot ensnare perpetrators of adultery who are not yet married, meaning that when adultery is committed by an unmarried couple, the act of adultery itself cannot be punished. Regardless of the reality of the problem, Indonesia has positioned adultery as an act that can be punished, meaning that there is a clear attitude in viewing adultery as an immoral act, and the state intervenes in enforcing the law through criminal law. This is one of the media in embodying Pancasila as a foundation of the nation's ideology.

In contrast to Indonesia, Turkey as a country has implemented Islamic law in full, and adultery at that time was clearly an act that violated legal norms and moral norms, but in the end along with political developments and changes in the legal system in Turkey then implementing secular ideology, secularism has created a strict barrier between religious and state issues, automatically the act of adultery is no longer an act that violates legal norms, there is even strong protection from the state in protecting the private rights of its citizens, including in relation to relationship issues. sexual.

2. In the Netherlands, in 1971, article 241 of the Criminal Code was abolished because this provision was related to matters of privacy, so it did not need to be controlled by legal institutions because marriage ties were a civil matter.

This offense is considered no longer relevant to the development of society in the Netherlands. Likewise with its effectiveness, since it was legalized around 80 years ago, only 8 cases have been handled.

3. In Malaysia, the settlement of adultery cases is carried out by the Sharia Court in Sarawak Malaysia based on the provisions of Ordinance 46 of 2001, the 2001 Sharia Crime Ordinance relating to morality by the Syariah High Court Judge in Sarawak Malaysia, sentenced to a maximum fine of five thousand ringgit or imprisonment for a maximum of three years. or caned not more than six times or punished by a combination of these punishments. In terms of implementing sanctions for violators who commit the crime of adultery, it is necessary to give authority to the provincial DPRD and DUN representing the province so that they can work together in establishing laws and regulations, and must not ignore sharia.

Adultery According to the sharia criminal provisions of the Malaysian state, in sharia criminal acts that can be caned are sexual crimes such as committing sexual intercourse outside of marriage or adultery, prelude to adultery or acts of preparation for sexual intercourse outside of marriage, acts of mahram incest. or sexual relations, prostitution, fornication of wife or

children, masturbation, and sexual intercourse which are contrary to natural law.

4. In Brunei Darussalam, perpetrators of adultery can be sentenced to various criminal penalties, namely stoning up to 100 (one hundred) times, a maximum fine of \$28,000 or Rp. 293,545,905, and a maximum prison sentence of 7 (seven) years.

Another difference is that Indonesia has implemented regulations regarding adultery since the colonial period by following Dutch criminal law. Meanwhile, the rules regarding adultery in Brunei Darussalam were initially only regulated in the civil realm through the provisions of Islamic Family Law (Islamic Family Law) Article 49 regarding divorce on the basis of Li'an or adultery. Then, in 2013, the Sultanate of Brunei Darussalam. The provisions of the Sharia Penal Code Order also regulate the issue of adultery.

Articles 68 to Article 74 state that what is meant by zina is not only sexual acts committed by a man or woman with someone who is not their husband or wife, but zina also includes sexual acts committed by a man and woman outside of marriage. marriage. The thing that differentiates adultery in Indonesia from that in Brunei lies in the regulation of the offense, namely, adultery is any act of extramarital relations. The difference in the determination of punishment between the rules of Indonesian criminal law and the Islamic criminal law of Brunei Darussalam is also different, where in terms of punishment and fines applied in Brunei the criminal penalties vary, namely stoning up to 100 (one hundred) times, a maximum fine of \$28,000 or Rp. 293,545,905, and a maximum prison sentence of 7 (seven) years. The penalties and fines applied in Brunei are clearly heavier than the criminal law applied in Indonesia, namely 1 (one) year in prison and a category two fine or IDR 10,000,000 (Ten million).

The description above is a comparison taken from several countries regarding the regulation of adultery articles as a reference for conducting comparative studies on adultery articles in Indonesia.

C. How is the comparison between adultery in the old and new Criminal Code articles viewed from the socio-cultural perspective of Indonesian society?

Adultery is an act that can damage the foundations and morality of the Indonesian nation. Although not regulated in a separate section regarding adultery, these articles are part of the chapter on crimes against morality. Article 284 of the Criminal Code regulates and explains that adultery is classified as adultery, namely sexual intercourse between unmarried couples, where one or both parties are still married to another person. So it can be interpreted that if there is a couple who is not married and has had sexual relations outside of legal marriage, then the act that has been carried out cannot be charged under the law and cannot be classified as an act of adultery. In other words, Article 284 of the Criminal Code provides an opportunity or acceptance for men and women having sexual relations outside of legal marriage. Based on the description above, article 284 requires a reform of the civil law relating to the adultery article. The act of adultery, which often disturbs society, cannot be judged according to expectations. The rules contained in the old Criminal Code, especially the article on adultery, were not in accordance with Indonesian culture. Referring to the Criminal Code regulations, adultery is synonymous with *overspel*, the meaning of which is narrower than the meaning of adultery itself. The translation of *overspel* is not quite appropriate as "adultery", because this does not only involve sexual relations for married people (*adultery*),

but for people who have sexual relations outside of marriage, and are not yet married to another person (*fornication*). Meanwhile, *fornication* is a translation of the word *ontuch* , not *oversvell* as written in the Dutch Criminal Code. The word adultery, which has a different context than in Indonesia, has a different direction from *the overspell* in the original Dutch language. Because of this, long-term problems arise which result in differences, mutitativity, rubber nature in application, and so on. Meanwhile, on the other hand, one of the principles of criminal law is *lex scripta*, *lex certa*, and *lex strica*. Which means everything must be clear, firm, and not subject to multiple interpretations.

Meanwhile, the regulations in the new Criminal Code, often known as the Nusantara Criminal Code, for the crime of adultery are regulated in a separate section in the chapter regarding Crimes Against Morality. In terms of the crime of adultery, there are three categories which are categorized into acts of adultery, among others:

1. Having sexual intercourse with someone who is not your husband or wife can be punished for adultery with a maximum imprisonment of 1 (one) year or a Category II fine. Meanwhile, paragraph (2) states that criminal acts as referred to in paragraph (1) are not prosecuted except upon complaints by the husband, wife, parents or children. (Article 411)
2. Carrying out " *cohabitation*" (*Samenleven/ Cohabitation*) or living together as husband and wife outside of marriage (Article 412).
3. Having sexual intercourse with blood relatives in a straight line or to the side up to the third degree (Article 413).

From the description above, we can see that the scope of the crime of adultery as formulated in the Indonesian Criminal Code is broader than that regulated in the Dutch Criminal Code. Article 411 expands the definition of adultery on the basis of criminalizing sexual relations outside marriage between single men and women. By using a values approach that is not in line with the morals of religious Indonesian society. The basis for the expansion of adultery is the direction of criminal law policy theory which aims to determine:

1. The extent to which the applicable criminal provisions require changes or updates;
2. What can be done to prevent criminal acts from occurring;
3. Determine methods of investigation, prosecution, trial and implementation.

In the Indonesian Criminal Code regulations, there are provisions in articles that regulate punishment for adultery, cohabitation, and incest. Punishments for perpetrators of crimes of adultery, cohabitation and incest vary. The regulations regarding adultery are contained in Article 411 of the Criminal Code which regulates that someone who has sexual relations without the status of husband and wife can be sentenced to a maximum of one year. However, adultery cannot be prosecuted without a complaint from the wife or husband for people who are bound by marriage and parents or children for people who are not bound by marriage. Article 412 stipulates that someone who lives together like husband and wife is subject to a maximum penalty of six months. In this article, criminal acts can proceed to prosecution if there is a report from the husband or wife, parents or children of the person concerned. The crime of adultery is regulated in Article 413. This article emphasizes that a person who has sexual relations with a family member can be sentenced to 10 (ten) years.

1. Pros and Cons in the Article of Adultery

The formulation of decency crimes in the draft criminal procedure code draws from existing laws and incorporates academic research, focus group input, and legal developments. The new regulations on adultery have sparked mixed reactions on social media. Supporters argue that they are beneficial, providing a deterrent against infidelity and justice for victims. In contrast, critics claim the regulations intrude into private matters, asserting that such issues should be personal and not subject to state intervention. Concerns also include the risk of penalizing individuals in unregistered marriages. The evidence for proving adultery, as outlined in Article 184 of the Criminal Procedure Code, includes witness statements, expert opinions, documents, and the defendant's statements.

Based on the description above, the author tries to provide a view regarding the pros and cons that occurred among the community, after the adultery article was legalized.

2. Pro side

With the ratification of this article on adultery, it provides many benefits for society, apart from aiming to strictly protect the sacred bond of marriage, this article on adultery is also expected to be able to uphold moral values in Indonesian society which are currently slowly being eroded and influenced by western culture. This of course aims to protect the nation's generation so that the moral and cultural values that exist in society are not lost and are properly protected.

3. Cons side

The expansion of the adultery offense in the new Criminal Code raises concerns about individual freedom and particularly affects couples with unregistered marriages, who lack official documentation to validate their union. While the article aims to deter adultery, protect the sanctity of marriage, and uphold moral values, critics worry it might infringe on personal freedoms and lead to legal complications for unregistered marriages. The article also seeks to combat issues like free sex and its associated risks, such as unwanted births and the spread of HIV/AIDS. Couples with unregistered marriages are advised to officially register their marriages to avoid future legal issues and align with Article 2, paragraph (2) of the Marriage Law, as unregistered marriages may face criminal consequences under Article 411, paragraph (1) of the Criminal Code.

CONCLUSION

The conclusion of this research shows that with modernization and the development of social culture in Indonesian society, several articles in the Criminal Code are no longer considered relevant. Some of these articles are considered controversial and need to be reviewed to accommodate cultural values that have been internalized in society. Changes to the new Criminal Code, especially regarding the offenses of adultery and cohabitation, show a reorientation of values with a focus on protecting and respecting the institutions of marriage and offspring, in contrast to the colonial Criminal Code which was based on the colonial values of its time. Adultery is regulated in the Criminal Code with relatively light penalties, but cannot be prosecuted without a complaint from the relevant party. The issue regarding the definition of adultery in the new Criminal Code also raises pros and cons in society, with supporters seeing protection for the institution of marriage and the moral values of Indonesian society, while opponents feel this issue is more personal and religious in nature. Overall, changes to

the Criminal Code need to be considered further to accommodate the social dynamics and values developing in Indonesian society today.

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