

A COMPARATIVE STUDY ON ARTICLE 241 KOREAN CRIMINAL ACT AND ARTICLE 284 INDONESIAN CRIMINAL CODE.

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ABSTRAK

Korea dan Indonesia sama-sama telah meratifikasi Deklarasi Universal HAM serta telah memasukkan hak-hak asasi manusia di dalam konstitusi kedua negara ini. Makalah berikut mengupas tindak perzinahan dalam undang-undang di Korea dan Indonesia. Metode kajian adalah perbandingan hukum, dengan menggunakan perspektif teori hukum normative. Kajian ini menemukan bahwa terdapat kesamaan hukuman yang dikenakan kepada pelaku zina dalam Pasal 241 ayat (1) dan ayat (2) Undang-Undang Korea No. 293 tahun 1963 (yang di amandemen terakhir tanggal 5 April 2013 Undang-undang No. 11731), dengan Undang-Undang Indonesia. Yakni pada Pasal 284 ayat (1) dan ayat (2). Pasal hukuman zina di Indonesia terpancar dari ideology negara Pancasila yang di dalamnya ajaran moral dari agama Islam serta adat-istiadat budaya masuk ke dalam Pancasila.

Kata kunci: Pasal 241 Undang-Undang Kejahatan, Korea, Pasal 284 Undang-Undang tentang Kejahatan, Zina, Nilai Agama, Pancasila

ABSTRACT

As the nations that have ratified the Declaration of Human Rights and both have established constitutional rights for citizens in the Constitution of each country, Indonesia and Korea have been conforming the Code /Act to the Convention. This paper is an account of comparing the Law about Act/Code on Adultery, in Korea and in Indonesia. The method is a comparative analysis of the Law, employing normative perspective. The finding of the account is that the Article 241 paragraph (1) and (2) of Law No. 293 of 1963, of Korea (the last amendment on April 5th, 2013 by the Law No. 11731) has in common with the contents of the Article 284 paragraph (1) and (2) of the Indonesian Penal Code or Wetboek van Strafrecht. The Indonesian Penal Code on adultery has been emanated mostly by Pancasila's ideology in which the principle of Islamic morality and the morality of

customary people appear in it; the adultery and fornication are quite contrary to the values of customary law, customs, also quite contrary to the moral values of religions.

Keywords: *Article 241 Korean Criminal Act, Article 284 Indonesian Criminal Code, Adultery, Sharing The Act/Code. Religious Values, Pancasila*

1. INTRODUCTION

All systems of law try to keep wrongdoing, or disruptive behavior, within limits. Otherwise people cannot feel secure. Complete security is not possible or desirable, but if people feel too insecure, they take the law into their own hands. They feel the need for law and, if the state does not provide it, make up their own informal and often vicious version of it.¹ When the state is strong enough, it has good reason to intervene and try to enforce decent standards of conduct. It has a better chance than victims and their families of being seen as fair and of reducing private vengeance to a minimum. The state and the international community try to deal with disruptive behavior in a way which aims at being both consistent and impartial. They decide what behavior is so disruptive that they must intervene; they make this behavior a legal wrong, but these legal wrongs do not cover everything that is regarded as wrong in private life.²

Many cultures have considered adultery as a very serious crime. Adultery often incurred severe punishment, usually for the woman and sometimes for the man, with penalties including capital punishment, mutilation or torture.³ Such punishments have gradually fallen into disfavor, especially in Western countries from the 19th century. In Western countries, adultery itself is no longer a criminal offense, but may still have legal consequences, particularly in divorce cases. For example, in fault-based family law jurisdictions, adultery almost always constitutes a ground for divorce and may be a factor in property settlement, the custody of children, etc.⁴

Though what sexual activities constitute adultery varies, as well as the social, religious and legal consequences, the concept exists in many cultures and is similar in Islam, Christianity and Judaism.⁵ A single act of sexual intercourse - the sexual intercourse that committed by the cheating spouses - is generally sufficient to constitute adultery.

Indonesia and Korea are the countries that have ratified the Declaration of Human Rights and both have established constitutional rights for citizens in the Constitution of each country. However, in terms of rule of law on adultery, both countries have different perspectives.

The author would like to compare about this Adultery, in Korea and in Indonesia. The interesting thing is that the Article 241 paragraph (1) and (2) of Law No. 293 of 1963, of Korea⁶ (the last amendment on April 5th, 2013 by the Law No. 11731) has in common with the contents of the Article 284 paragraph (1) and (2) of the Indonesian Penal Code or *Wetboek van Strafrecht*⁷.

2. DEFINITION

The definition of adultery is a lot written in the legal books and dictionaries; the author tried to take the definition of adultery which is more common, given that many countries which stated that adultery is not a crime and removes the criminal provisions against adultery.

Adultery (*overspel*) is the act of intercourse which is committed by people who are bound by marriage, to the person who is not the wife or husband.⁸

Adultery is composed of acts of intercourse between a married person and someone who is not his wife or her husband, where sexual intercourse conducted voluntarily.⁹

Adultery is 1) Extramarital sex that willfully and maliciously interferes with marriage relations; 2) The unfaithfulness of a married person to the marriage bed; sexual intercourse by a married man with another than his wife, or voluntary sexual intercourse by a married woman with another than her husband.¹⁰

The term adultery refers to sexual acts between a married person and someone who is not that person's spouse. It may arise in criminal law or in family law.¹¹

It can be concluded that the definition of adultery is limited to sexual acts between a married person and someone who is not that person's spouse. This understanding is in fact different from the meaning of 'Zina' prevailing in Muslim countries and in Indonesia. This will be explained in another section.

3. ADULTERY IN THE KOREAN CRIMINAL ACT

According to the Korean Criminal Act, Chapter XXII under the title of Crimes Concerning Sexual Morals, Article 241 (Adultery) paragraph (1) stated that "A married person who commits adultery shall be punished by imprisonment for not more than two years. The same shall apply to the other participant".

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Article 241 paragraph (2) stated that “the crime in the preceding paragraph shall be prosecuted *only upon the complaint of the victimized spouse*. If the victimized spouse condones or pardons the adultery, complaint can no longer be made”. (□241□ □2□:

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Analyzing on Article 241 paragraph (1) and (2), it can be said that the judgment will only exist if the party who feel betrayed, complaint it to the law enforcement authorities, adultery could only be prosecuted on complaint from an injured party. This Article is already much better historically, because the party is punishable not only to women who commit adultery, but also to man who was married, and he committed adultery.

Previously, the punitive regulations against adultery existed since the Eight Prohibitions of the ancient Korean Kingdom Gojoseon, the first Korean law, and such penalties have remained in place despite some changes. The Penal Code promulgated on April 20, 1905 as Act No. 3 of the Greater Korean Empire, sentenced married woman who committed adultery and the associated fornicators to a prison term between no less than six months and no more than two years, according Article 265 of the Act. Article 183 of the former criminal law of Japan, which was adopted as Act No. 11 of the Criminal Code of Joseon Dynasty and implemented on April 1, 1912 under the Japanese colonial rule, imposed a prison term of no more than two years on the convicted married women and the relevant fornicators.¹⁴

3.1. The First Constitutional Court Decision on Adultery

According to the adultery case decision of the Constitutional Court [20-2(A) KCCR 696, 2007 Hun-Ka 17.21, 2008 Hun-Ka 7.26, 2008 Hun-Ba 21.47 (consolidated), October 30, 2008]¹⁵, in this case, the Constitutional Court decided that Article 241 of the Criminal Act, which imposes imprisonment as the only statutory sentence in the criminal punishment of adultery or fornication with a married person, does not contradict the Constitution of Korea or *Constitutional*.

The background of the decision was that the Constitutional Court previously ruled the anti-adultery provision constitutional three times on September 10, 1990, March 11, 1993 and October 25, 2001, respectively that are 89Hun-Ma82, 90Hun-Ka70 and 2000Hun-Ba60. While social controversy over the anti-adultery provision continued, the following cases were consolidated, they were: two cases where the ordinary court hearing a trial on prosecution of adultery, *sua sponte*¹⁶, requested for the constitutional review of the aforementioned provision, that are 2007Hun-Ka21 and 2008Hun-Ka26; two in which the ordinary court granted the defendant’s motion to

request for the constitutional review of the aforementioned provision and requested this constitutional review of statutes to the Constitutional Court (2007Hun-Ka17, 2008Hun-Ka7); and another where the other defendants filed a constitutional complaint him/herself pursuant to Article 68 Section 2 of the Constitutional Court Act as the ordinary court denied their motion to request for the constitutional review (the case of 2008Hun-Ba21.47).

The summary of decision is that the Constitutional Court, in an opinion of 4 to 5, falling short of the quorum of six votes required for the decision of unconstitutionality, ruled that the anti-adultery provision does not violate the Constitution.¹⁷ Three justices stated that the Article was constitutional, one justice had concurring opinion with the opinion of the other judge, and opinion of other four judges were unconstitutional, another judge stated the Article incompatible with the Constitution. The provision at issue does not violate the Constitution since the quorum of six votes required for the holding of unconstitutionality is not met.

3.2. The Second Constitutional Court Decision on Adultery

South Korea's Constitutional Court has struck down an Article outlawing adultery under which violators faced up to two years in prison. The nine-member bench ruled by seven to two that the Article 241 was unconstitutional. Presiding justice Park Han-Chul, as one of the judges who give decisions stated that even if adultery should be condemned as immoral, state power should not intervene in individuals' private lives, and public conceptions of individuals' rights in their sexual lives have undergone changes.¹⁸

In the past six years, close to 5,500 people have been formerly arraigned on adultery charges - including nearly 900 in 2014. But the numbers had been falling, with cases that end in prison terms increasingly rare. Whereas 216 people were jailed under the law in 2004, that figure had dropped to 42 by 2008, and since then only 22 have found themselves behind bars, according to figures from the state prosecution office.¹⁹ The downward trend was partly a reflection of changing societal trends in a country where rapid modernisation has frequently clashed with traditionally conservative norms. The law was grounded in a belief that adultery challenged the social order and damaged families, on the other hand, critics insisted it was an outdated piece of legislation that represented state overreach into people's private lives.

Example of case which has become a public concern, such was the case in 2008 when one of the country's best-known actresses, Ok So-Ri, was given an eight-month suspended sentence for adultery. Ok had unsuccessfully petitioned the Constitutional Court, arguing that the law amounted to a violation of her human rights in the name of revenge. The court had

previously deliberated the issue in 1990, 1993 and 2001, and in each case dismissed the effort to have it repealed. In 2008, five of the justices deemed the law to be unconstitutional, arguing that adultery could be condemned on moral grounds but not as a criminal act.²⁰

3.3.The Case [2009Hun-Ba17.205; 2010Hun-Ba194; 2011Hun-Ba4; 2012Hun-Ba57.255.411; 2013Hun-Ba139.161.267.276.342.365; 2011Hun-Ka4; 2014Hun-Ba53.464 (consolidated), February 26, 2015]
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The subject matter of review is the constitutionality of Article 241 paragraph 1 and 2 of the Criminal Act, enacted as Act No. 293 on September 18, 1953. The Constitutional Court decided that Article 241 of the Criminal Act that imposes imprisonment as the criminal punishment of adultery or fornication violates the Constitution or unconstitutional.

Background of the case was that the petitioners, who were prosecuted on a charge of adultery or fornication, filed the motion to request for the constitutional review on Article 241 of the Criminal Act, alleging the unconstitutionality of the aforementioned provision. After the motion was denied, the petitioners filed the constitutional complaint. Uijeongbu District Court and Suwon District Court, while hearing a trial on prosecution of adultery or fornication, requested for the constitutional review of the aforementioned provision, according to the motion of defendants or *sua sponte*.

According to the opinion of five justices that stated unconstitutional, the provision at issue which intends to promote the marriage system based on good sexual morality and monogamy and to preserve marital fidelity between spouses, restricts the rights to sexual self-determination and to privacy that are protected under the Constitution. There is no longer any public consensus regarding the criminalization of adultery, along with the change of public recognition on social structure, marriage, and sex and the spread of an idea to value sexual self-determination. In addition, the tendency of modern criminal law directs that the State should not exercise its authority in case an act, in essence, belongs to personal privacy and is not socially harmful or in evident violation of legal interests, despite the act is in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes. It should be left to the free will and love of people to decide whether to maintain marriage, and the matter should not be externally forced through a criminal punishment.²²

Furthermore, considering the current rate of punishing adultery and the degree of social condemnation against adultery, it is hard to anticipate a general and special deterrence effect for adultery from the perspective of criminal policy. The protection of obligation to remain faithful between

spouses and the protection of female spouses would be effectively achieved by a claim for judicial divorce against a spouse who committed adultery (Article 840 Item 1 of the Civil Act), a claim for damages (Article 843 and 806 of the Civil Act), disadvantages in deciding custody and the restriction or exclusion of visitation rights (Article 837 and 837-2 of the Civil Act) or a claim for division of property (Article 839-2 of the Civil Act). Adultery law has often been misused in divorce suits by spouses whose liability is much bigger or by those outside the marriage to blackmail married women who have temporarily cheated on their husbands. With the comprehensive considerations, the provision at issue fails to achieve the appropriateness of means and least restrictiveness.

Whereas it is difficult to suppose that the provision at issue can any longer serve the public policy objectives of protecting marriages and spousal obligation of faithfulness, the aforementioned provision *excessively restricts the basic rights of the people, including the right to sexual self-determination*, thereby **losing the balance of interests** (one of the Principles of Proportionality). Therefore, the provision at issue violates the Constitution for infringing on the right to sexual self-discrimination and secrecy and freedom of privacy.

Other one Justice stated also the provision at issue was unconstitutional: the essence of adultery is the intentional breach of sexual faith between spouses by a person who chose marriage based on his/her free will. The criminal punishment against a person who committed adultery and the other participants has a legitimate legislative purpose to protect the least social ethics order that connotes a marital system based on the spousal obligation of faithfulness, implying that it is not an excessive restriction on the right to sexual self-determination. Besides, there is a public consensus for the necessity of criminalization of adultery. Nonetheless, *a certain types of adultery which is committed in a situation where marriage is de facto dissolved and the spousal obligation of faithfulness no longer exists are neither morally reprehensible nor anti-social* - this can happen to adherents of Christianity which strongly discourages divorce. In addition, a single person who fornicated with a married person should not be punished by criminal punishment in that it is impossible to presume his/her spousal obligation of faithfulness and the breach of faith: Rather, **it would be desirable to assume his/her responsibility through ethical or moral criticism or civil tort liability**. Provided, if a single person who fornicated with a married person lead to fornication for active provocation or temptation, it would be justifiable to exercise the State's authority for criminal punishment for its significant reprehensibility and anti-sociality. The provision at issue provides that all modes of adultery and fornication shall be uniformly punished without any consideration of singularities and

specificities, according to the types of a person who committed adultery or fornication and specific styles of action. It would violate the Constitution for excessive exercise of State's criminal punishment authority in that it excessively restricts the right to sexual self-determination, overstepping its boundary of role in achieving the purpose and function of criminal punishment.²³

Other justice stated the provision at issue was unconstitutional, according to him, adultery of a married person becomes a major threat to monogamy and causes social problems including an abandonment of his/her spouse and family members. It justifies legal regulation despite adultery or fornication falls into the domain of intimate privacy. Nevertheless, accusation cannot be filed if the victimized spouse condones or pardons the adultery. ***The meaning of condone or pardon, which constitutes the prosecution requirement, is not clearly defined***, suggesting that the people subject to the law cannot predict the scope and limits of governmental power. Therefore the provision at issue ***infringes on the principle of clarity***.²⁴

Two judges have different opinions expressed on this Article 241 (dissenting opinion); they said that the act of adultery is not included in the realm of the protected individual right to sexual self-determination, because such an act would damage the social system, which is marriage based on monogamy, and have a destructive impact on protecting and maintaining families. Our legal awareness still tells us that ***adulterous acts of a married person and the other participant*** not only regard ethical or moral issues but also threat social order and ***infringe on the others' rights***. The abolition of adultery might lower the sexual morality of our society by demolishing an axis of 'the least sexual morality'; cause disorder of sexual morality of our society by repealing the criminal awareness against adultery; and stimulate, accordingly, dissolution of marriage and family community. Therefore it is difficult to assume that legislature's judgment to criminally punish adultery is arbitrary. It would be debatable whether the criminal punishment on adultery where marriage is irreparably broken and the spousal obligation of faithfulness no longer exists is beyond the reasonable scope to achieve the legislative purpose. Nonetheless, the aforementioned mode of adultery would not be punished for the lack of illegality in that it would not contradict the social rules under the social ethics and social norms. The provision at issue stipulates only imprisonment as punishment, but the maximum sentence of two years would not be heavy and the sentence shall be mitigated to suspension of sentence for adultery crime whose gravity of crime is not substantial. Because ***light fines are not likely to have deterrence effect on adulterers, the balance of the criminal punishment system is not violated***.²⁵ The current systems and practices of the Civil Act do not offer sufficient protection for the socially and economically underprivileged in case of

divorce. *If adultery crime is abolished without providing the social safety-net* for custodial responsibility and broken family upon divorce, it is concerned that several family communities *would be dissolved and human rights and welfares of the underprivileged and young children would be infringed*, for placing one's right to sexual self-determination and privacy before the responsibility of marriage and preciousness of family. Punishment of adultery is still meaningful in Korean society. Whereas the provision at issue protects the sound sexual morality and marriage and family life, *the regulation of acts by the provision at issue is a restriction on sexual behaviors in specific relations, thereby not infringing the reasonable proportionality*. The provision at issue would not violate the Constitution in that it does not restrict the right to sexual self-determination as it does not infringe on the principle against excessive restriction.²⁶

4. THE COMPARATIVE LAW PERSPECTIVE.

The adultery crime is punished under three principles: 1) unequal punishment between men and women; 2) equal punishment irrespective of sex; 3) non-punishment both for male and female.²⁷ The first principle is witnessed in the pre-revised French criminal law and the ancient Italian criminal law, where punishment of adultery differs between husbands and wives, as well as in the Japanese criminal law before its abolition in 1947, and the former Korean criminal law that adopted it from the Japanese criminal law before its abolition, both of which only penalized the wives for adultery. The second principle is adopted in the Korean criminal law since 1953 until after the first decision of Korean Constitutional Court on adultery (based on the cases 2007Hun-Ka17, 2007Hun-Ka21, 2008Hun-Ka7, 2008Hun-Ka26, 2008Hun-Ba21, 2008Hun-Ba47)²⁸ and a few states of the United States. The third principle is the principle of not imposing any criminal punishment on neither of two offenders of adultery is adopted in Denmark, Sweden, Japan, Germany, France, Spain, Switzerland, Argentina, and Austria, where regulations of adultery were removed in 1930 (Denmark), 1937 (Sweden), 1947 (Japan), 1969 (Germany), 1975 (France), 1978 (Spain), 1990 (Switzerland), 1995 (Argentina), 1996 (Austria), respectively.²⁹ In the end, South Korea has also adopted the third principle, in 2015, after the Constitutional Court stated that Article 241 of the Criminal Act is unconstitutional.

4.1. Adultery In The Indonesian Criminal Code

According to Article 284 of Indonesian Criminal Code (Wetboek van Strafrecht),
Paragraph (1):

By a maximum imprisonment of nine months shall be punished:

1. a) **any married man** who knowing that Article 27 of the Civil Code is applicable to him, **commits adultery**;
b) **any married woman who commits adultery**;
2. a) **any man** who takes a direct part in the act knowing that the guilty co-partner is married and that Article 27 of the Civil Code is applicable to him.³⁰

Paragraph (2): **No prosecution shall be installed unless by complaint of the insulted spouse**, followed, if to the spouse Article 27 of the Civil Code is applicable, within the time of three months by a demand for divorce or severance from board and bed on the ground of the same act.

Paragraph (3): In respect of this complaint Articles 72, 73 and 75 shall not be applicable.

Paragraph (4): the complaint may be withdrawn as long as the judicial investigation has not commenced.

Paragraph (5): If Article 27 of the Civil Code is applicable to the spouse, the complaint shall not be complied with as long as the marriage has not been severed by divorce or the verdict whereby severance from board and bed has been pronounced, has not become final.

As stated earlier in this article, Article 284 paragraph 1 and 2 of Indonesian Criminal Code have in common with Article 241 paragraph 1 and 2 of the Korean Criminal Act. It can be traced that Indonesia's Criminal Code was adopted from Dutch law and drafted in 1918, and it was last revised in 1958, and is currently being drafted the Bill of the Criminal Code. If explore further, the Dutch criminal law is rooted in the French Penal Code.

Article 183 of the former criminal law of Japan was adopted as Act No. 11 of the Criminal Code of Joseon Dynasty and implemented on April 1, 1912 under the Japanese colonial rule. As it is known, that the law used by the Japanese people are adopting or rooted in French and German law, in the mid of 19th century and early 20th century (Meiji period).³¹ Thus, Korea and Indonesia are the countries which have the same criminal law source, which is rooted in French criminal law (Civil Law System or Continental Legal System). Hence, it is not surprising that the regulation of adultery have in common, at a time when both the law had not been abolished.

4.2. Overview of Adultery in Indonesia.

The results of research conducted by the National Law Development Agency of Indonesia, on the influence of religion on criminal law, for the people of Indonesia in general, including the people of Bali, Aceh and Manado, they argue that the Criminal Code has not given a sense of justice to the people. The conditions are very possible to happen, because the notion of crime under criminal law is different from the understanding of crime by

society. In connection with this, the dissatisfaction of some people regarding deviant behavior, especially in the sphere of morality. This is because the behaviors that deviate from the norms of society have not got a proper place in criminal law. For example is the act of adultery, which according to public understanding is different from the definition in the Criminal Code.³² People assume that adultery is an act that deserves criminal sanction, customary sanction and social sanctions, while the Criminal Code sanctions tend to provide light and the report is limited to only the husband / wife of adulterer.

According Sudarto, that if criminal law is used to solve social problems, then it should be considered carefully, since criminal law has a subsidiary function. This means that the criminal law can only be used when all other measures estimated to be less satisfactory results. If the criminal law continues to be involved to tackle social problems, it should be seen in the overall criminal political system.³³

Law enforcement officials and legal experts, many who approve of the offense of adultery remain governed as one offense, either in recent criminal law, as well as for criminal law in the future, although the understanding of adultery according to the rules of criminal law is not covering understanding of adultery in the view of society, based on some legislation that recognizes the existence of the *unwritten law*, as well as the statement of the results of the symposium, the following:³⁴

1. Article 5 paragraph (3) a, of The emergency Law No. 1 of 1951 stated that an act, which by law are living in a society, should be regarded as a crime, but unequaled in the Criminal Code, it is considered to be threatened with punishment, which is not more than three months in jail and / or a fine of five hundred rupiah, namely as substitute punishment, where traditional sanctions (customary sanctions) have been imposed, are not complied with by the party condemned. When the traditional sanctions were imposed, according to the judge, it had exceeded the confinement sentence, or had exceeded penalties such as fines; the defendant may be subject to a substitute penalty, as high as ten years in prison;
2. The Law No. 4 of 2004, Article 5 paragraph (2) stated that the court may not refuse to examine and adjudicate a case which was filed, on the grounds that the law does not clear or less clear, but obliged to examine and trial; Article 23 paragraph (1) stated that “All court decisions, in addition there is an obligation to contain the reasons and grounds of the decision, should also contain specific provisions on the rules are concerned, or sourced from an *unwritten law*”; Article 28 paragraph 91) stated “The judge shall explore, and understand the values of law and sense of justice, who live in the community”.
3. Resolution of the Division of Criminal Law, the First National Law

Seminar 1963. Point IV of the resolution stated “Which is regarded as evil deeds are the deeds of its elements defined in the Criminal Code and other legislation. This does not preclude the prohibition against acts according to customary law, who live in the community, and does not inhibit the formation of society who aspired earlier, with traditional sanctions that are still incompatible with the dignity of the nation”. Point VIII of the resolution stated that elements of the religious law and customary law are carried out in the Criminal Code.

4. The conclusion of the Commission II, Symposium on the Influence of Culture and Religion on the Criminal Law, 1975; on the response to crime in the Criminal Code, and other misconduct, which has norms of mutual support between legal norms and religious norms or customs, among others: adultery, prostitution, etcetera, session obtain the opinions, the emphasis addressed to Adultery in the Criminal Code is given in a broad sense, because at the present time is deemed unsuitable;
5. In Sub B II report on "National Legal System" stated among other things:
 - 1) National Legal system should match the needs and legal awareness of the people of Indonesia;
 - 2) National law sought as much as possible in written form. In addition, the unwritten law remains part of national law.

There are several court verdicts, which recognize adultery as one offense, based on customary law prevailing in the society, which determines that according to local custom, a person should be convicted for adultery, are as follows:

1. The Supreme Court verdict, dated 19 November 1977, No. 545 K / Kr / 1976;³⁵
2. The Supreme Court verdict No. 666 K / Pid / 1984.³⁶

4.3. Incorrect Conception of Indonesian Criminal Code

As mentioned in Part II above, regarding the Definition, that in Indonesia, the notion of “*zina*”³⁷ or “*perzinaan*” that stated in Article 284 of Indonesian Criminal Code identified with *overspel*.³⁸ In fact, Criminal Code provisions regarding the offense “*zina*” have a different understanding with the conception given by the people. According to the Criminal Code, “*zina*” identified with *overspel* or adultery, whose meaning is much narrower than the ‘*zina*’ itself. *Overspel* can only happen if one of the perpetrators or both actors have tied a marital relationship. *Overspel* can be dealt with by the criminal law if there is a complaint of the wife or husband of actors, without any complaints, or without a complaint by the wife / husband then a criminal offense *overspel* is not a forbidden thing.

This is in contrast with the conception of society/the nation of Indonesia, which is communal and religious, any form of ‘*zina/perzinaan*’,

well have tied a marital relationship or not, is a taboo act that violates the values of decency and morality. '*zina/perzinaan*' in a review of Islamic criminal law is broader than the restrictions in the Criminal Code. Islamic criminal law does not care with whom intercourse was done. The concept embraced by the public, contained in the rules of customary criminal law and Islamic law which became a separate section of the Criminal Code.

Islamic criminal law does not care with whom intercourse was done. The sexual intercourse, if committed by a married person, the perpetrator called the perpetrators *Muhsan*, and when intercourse is done by people who are not married, the perpetrator called the perpetrators *gairu Muhsan*. Islamic law in practice can only be implemented in certain regions in Indonesia, arranged in the form of local regulation, for example in Aceh province, Sumatra Island.

Customary (*Adat*) Criminal Law as it also regulates *perzinaan*, almost the same as what is stipulated in Islamic law, the perpetrators of *perzinaan*, which is not only done by those who are married. Sexual intercourse outside marriage valid either married or unmarried still regarded as forbidden acts and is known as *perzinaan*.³⁹

4.4. The Bill of the Criminal Code

A reform proposal would upgrade the 1918 Code, revised in 1958. Adulterers, fornication and practitioners of black magic could be jailed for years and receive hefty fines. Couples living together out of wedlock would also be punished. At present, common law relationships are not illegal in Indonesia, but once changes are adopted, couples could get a maximum sentence of one year in prison. The same punishment for those convicted of prostitution. Adultery is already illegal. However, under the new rules, couples could get up to five years behind bars against the current nine months. The ministry of Justice and Human Rights argued that the current maximum sentence for convicted adulterers, nine months in prison, had failed to curb extramarital affairs in Indonesia. Under the proposed revision, cheating spouses would face a maximum sentence of five years in jail.

A parliament member said that adultery is the beginning of many social problems. The sentence should deter offenders, and nine months is not long enough. He agreed that the sentence should be increased, but five years is too long. He also welcomed the proposed laws against premarital cohabiting because under the current code there is no way to punish couples who choose to live together.⁴⁰

4.5. The Five Principles of *Pancasila* as the Standards of Conduct and Constitutional Court.

Eighty percent of Indonesia's population is Muslim. But Indonesia does not make Islam as a state religion. Nonetheless, with a population of muslim as majority, then, when the Founding Fathers draw up the 1945 Constitution, and lay the foundations of the state, as the basic philosophy of the nation and legal basis, namely *Pancasila* (five principles) that placed in Preamble of the Constitution, the principle of Islamic morality and the morality of customary people appear in the Pancasila. Pancasila is also the embodiment/Materialization of a combination of value systems; the combination of the system of values on races and ethnicity/tribes (Indonesia has multi-ethnics, multiple languages, many religions/adherents of the beliefs).

In the concept of the Rule of Law state, the ideal commander in the dynamic of life is the law. The tradition of power based on such rule of law had also existed in the statehood history of the people of the archipelago (Indonesia) for a long time, before the Independence of Indonesia. In the Minangkabau (West Sumatera) culture, the principle of "*adat basandi syara, syara basandi kitabullah* [customary law hinge on Islamic law, Islamic law hinge on the Koran]" symbolises the dominance of the religious tradition. At the same time, this principle also symbolises the dominance of customs and customary law in the Minangkabau culture. The leadership tradition in Minangkabau society must unavoidably submit to the customary law. Likewise, in the tradition of power in the Kingdom of South Sumatera, Kalimantan Island, and even in Gowa in South Sulawesi (Celebes Island), the status and role of customary law are known to be very dominant. All of these reflect the tradition of supremacy of law in the various systems of power applicable in the kingdoms of the past.

The conditions as mentioned above, the tradition of power based on such rule of law; customs, customary laws, Islamic law, the leadership tradition of kingdoms in the statehood history of the people of Indonesia for a long time that long before the independence of Indonesia, are the truth conditions. Thus, it is not surprising that the norms of customary and religious norms became crystallized into the basic philosophy of the country as well as the legal basis. Then, no wonder that the first principle of Pancasila (five principles) is "The belief in the One and Only God".

Understandings of the first principle "The belief in the One and Only God", among others, that all activities of the state and society should be based on the good customs moral values and religion moralities. Indonesia is a nation that is godless, there should not be a citizen who does not have a religion - though in fact, many citizens that include the name of a religion on National Identity Cards, but they never carry out religious activities. Furthermore, that any acts should not conflict with the moral values of

customs and customary law, and the moral values of religions which are recognized in Indonesia.

Therefore, adultery and fornication are quite contrary to the values of customary law, customs, also quite contrary to the moral values of religions. Acts of adultery and fornication, those are definitely contrary to the first principle of Pancasila. So, no surprise anyway when the rules / laws about adultery, fornication, rather than eliminated, even adultery and fornication punishment for the perpetrators to be improved, according to the Bill of Indonesian Criminal Code.

5. CONCLUSION

Article about adultery in Korean Criminal Act and in the Indonesian Criminal Code have the same penalty, that adultery is a criminal offense, if there is a complaint of the offended party. But in its development, the Korean Constitutional Court has stated that adultery is unconstitutional, so, adultery is not a criminal act. For Indonesia, adultery is one of the kinds of intercourse that is not legitimate, called "zina". The act of *zina* has a broader scope than the adultery and fornication, also for living together outside of marriage. Whereas custom moral/customary law values and morals of religions take precedence in the life of the nation. That these values have become the main principle, which is mentioned in the first principle of Pancasila, in the preamble of the 1945 Constitution. In fact, in the Bill of the Indonesian Criminal Code, the punishment for adultery and fornication will be improved, not be abolished.

ENDNOTE :

¹ Tony Honore, *About Law, An introduction* 53 (2002).

² *Ibid.*

³ See [The doctrine and Law of Marriage, Adultery, and Divorce](#) at [Google Books](#).

⁴ Wikipedia, *Adultery* (May 10, 2016), <https://en.wikipedia.org/wiki/Adultery>

⁵ *Ibid.*

⁶ □□, 1963□, □□ □293□ (the last amendment on April 5th, 2013 by the Law No. 11731)

⁷ The Penal Code, which was initially taken by the Dutch government, however, after formally adopted by the Indonesian criminal law, this book has undergone adjustments.

⁸ Ministry of Justice of the Republic of Indonesia, *Kamus Hukum Pidana* 131 (1988).

⁹ H.A.K Moch. Anwar, *Hukum Pidana Bagian Khusus (KUHP Buku II)*, 223 (Vol.II, 1986).

¹⁰ Artikata, *Definisi adultery*, <http://www.artikata.com/arti-2984-adultery.html>.

¹¹ Wikipedia, *Adultery, Loc., Cit.*

¹² □□□□□, 2014 □□□□ 557 (□□: □□□□□, 2014).

¹³ *Ibid.*

¹⁴ Constitutional Court of Korea, *Constitutional Court Decisions 754 (2005-2008)* (Vol.II, 2009).

¹⁵ *Ibid.* p. 747.

¹⁶ *Sua sponte*, Latin for "of one's own will," meaning on one's own volition, usually referring to a judge's order made without a request by any party to the case. These include an order transferring a case to another judge due to a conflict of interest or the judge's determination that his/her court does not have jurisdiction over the case.

Read more:
<http://dictionary.law.com/Default.aspx?selected=2032#ixzz47aCJbdvw>.

¹⁷ Constitutional Court of Korea, *Constitutional Court Decisions Vol. II (2005-2008)*, *op.cit.* p.748.

¹⁸ The Guardian, South Korea Legalises adultery, <http://www.theguardian.com/world/2015/feb/26/south-korea-legalises-adultery>.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Constitutional Court of Korea, Adultery Case, <http://english.court.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do?searchClassCode=ENEXECLSS&searchClassSeq=519>.

²² *Ibid*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Constitutional Court of Korea, *Constitutional Court Decisions Vol. II (2005-2008)*, *op.cit.* p.755.

²⁸ *Ibid.* p. 750.

²⁸ *Ibid.*

²⁹ *Ibid*

³⁰ *Wetboek van Strafrecht (versi Bahasa Inggris)*, <http://www.hukumonline.com/pusatdata/download/lt4c7b80e6173ef/node/lt4c7b7fd88a8c3>.

³¹ Ajimumpung, *Sejarah Hukum Jepang*, <http://tafafari.blogspot.kr/2014/05/sejarah-hukum-jepang.html>.

³² Vhison Az, *Dasar Hukum Zina Sebagai Delik Dalam KUHP*, <http://perzinaan-hukum.blogspot.kr/2013/09/dasar-hukum-zina-sebagai-delik-dalam.html>.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ According to this verdict, a crime under customary 'zina', is a forbidden act regarding sexual relations between men and women, regardless of public places or not the act was carried out, as required by article 281 of Criminal Code, or apart from the requirement if one of the parties was married or not, as contemplated by article 284 Criminal Code.

- ³⁶ According to this decision, the cassation decision was concerning an accused, a young man (30 years) having intercourse with the girl (24 years), with the promise of marriage. But after the girl was pregnant, the young man refused to marry the girl. According to the people in Luwuk, Central Sulawesi, scene of this case, the action was included offense of customary crime “zina” that has no counterpart in the Indonesian Criminal Code. On the basis of Article 5 paragraph (3) sub b Emergency Act, No.1 of 1951, the defendant was sentenced to a criminal, in the form of imprisonment of three months.
- ³⁷ Zina (spelling is not standard: zinah; Arabic: انزلا) is 1) the act of intercourse between men and women, who are not bound by a marital relationship (marriage) 2) copulate deeds of a man who is bound by a marriage with a woman who is not his wife, or a woman who married to a man who was not her husband. See <http://kamusbahasaindonesia.org/zina>.
- ³⁸ *Overspel* is Dutch for adultery.
- ³⁹ <http://repository.usu.ac.id/bitstream/123456789/44021/3/Chapter%20II.pdf>
- ⁴⁰ <http://jakartaglobe.beritasatu.com/news/indonesias-new-criminal-code-outlaws-adultery-cohabiting-couples-dark-magic/>

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