

# The Urgence of Reconstruction the Offense of Adultery in Indonesia: A Form of Protection Against Legal Marriage and Sexual Morals Muslim Society

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## **Abstract**

The aim of this study is to find exact formulation of the offense of adultery. Problems in the research: 1) how Indonesian muslim society understand and act toward adultery, 2) why muslimsociety solve adultery without taking 284 Criminal Code, 3) why reconstruction of adultery law is needed,

The research designs are qualitative tradition, constructivism paradigm, socio legal methodology, while its approaches are hermeneutics, philosophy and phenomenological approach. Its analyzing data technique are inductive analysis through data reduction and triangulation.

The results show that Indonesian muslimsociety in sanctioning toward people committing intercourse without any legal marriage. In sanctioning is based on local custom and Islamreligion believed by major local community, with its priority on justification principle, between human as individual and as social creatures, and its justification between the victim's need and the actor's importance.

The conclusion is that adultery criteria based on society is every intercourse without legal marriage, in accordance of religion and state, both is done by heterogeneous gender or homogenous gender. The value on 284 Criminal Code clause does not suit on the believed value by society since it only protects marriage institution. Meanwhile, in the values of Islamreligion, ones whom are protected is not only marriage institution but also the values of sexual moral society, so muslimsociety does not use 284 Criminal Code clause to take an action toward adultery actor.

In progressive law, if law has problem therefore it needs to be reconstructed, and it is not the people to be insisted in adopting toward the law, then 284 Criminal Code clause must be reconstructed, because it is not effective and cannot create proper justice for Indonesian society. In the concept of Legal Pluralism, to reconstruct the clause must based on religious law, local custom and state Law, to create perfect justice.

**Keywords:** Reconstruction, Adultery, Legal Pluralism, Muslim Society

## A. BACKGROUND

Indonesian society is religious communal society. Religious values into a foundation or base value in the establishment of norms in society. In addition, as a communal society, solidarity are important values upheld in civic life. Those values are indicative to live together. Indonesian society is a religious society that the majority religion of Islam

Indonesian society is a religious society that the majority religion of Islam, better known as the Muslim society so that the daily behavior and in her social order based on the values of the Islamic religion. Therefore, in the governance of the association of Indonesian society, has become a law of life that fornication is prohibited and the offenders should be sanctioned. Indonesia also communal society, which has a high sense. This resulted in the community take responsibility for resolving cases of adultery. So in case of adultery, which participated resolve not only their partners but families, communities and even participate finish.

Then in case of actions contrary to Islam values and the values of togetherness, As a muslim society and communal will take action in response to such actions. Similarly, the act of adultery, the Indonesian people react to the measures which may differ for each region, although the essence of the underlying value of the same.

The public sanction against adultery because adultery is one form of actions that are contrary to the values of Islam and traditional values. The form of sanctions against acts of adultery can be known from the news media, which proclaim the people's actions in resolving adultery out of court.

Based on several examples of the completion of acts of adultery, it can be said that the people using the legal basis in the form of living law, the legal norms applicable in the society in the form of decision-making person or group of people who are socially given the authority to impose sanctions on offenders. So the legal basis used by the people in completing the acts of adultery is not just the form of the values that live in a society that is normative static but has been through the agreement process that results in a decision of the person or group of people who

## The Urgence of Reconstruction the Offense of Adultery in Indonesia

believed or selected by the community to complete the follow-adultery occurred within the community.

Phenomena that exist in the community is an understanding of the difference between public adultery with formal legal rules, sanctions imposed by society governed by law is also different, method or process that people have on the completion of adultery is also different with the existing legislation.

Muslim society action against the offenders of adultery that is different from the existing provisions in the formal law often creates problems that harm public. Indonesian society have an understanding about the adultery based on the norms of Islam and customary norms. the understanding of influential on how Indonesian society hearts finish adultery. community hearts more finish adultery often using their way believed the truth and more can represent a sense of justice expected. although some of adultery by community brought to justice, but often time society dissatisfied with findings of the court.

Does not use a formal law (Article 284 of the Criminal Code) in tackling adultery show that such laws are not effective. The impact is the increased prostitution, the rise of cohabitation, adultery, acts of abortion, infanticide, abandonment / dumping babies, all of which lead to moral degradation of the nation of Indonesia. Therefore it is necessary to study the attitudes of society and Article 284 of the Criminal Code. Therefore it is necessary to research the attitudes of society and Article 284 of the Criminal Code.

Based of background, so this research designs used qualitative tradition, constructivism paradigm, socio legal methodology, while its approaches are hermeneutics, philosophy and phenomenological approach. Its analyzing data technique are inductive analysis through data reduction and triangulation.

As for the issues to be studied are :

1. How is the perspective of muslim society toward adultery and how do they respond to adultery in society?
2. Why 284 Criminal Code clause is not effective to solve adultery?
3. Why is it needed for the reconstruction of adultery law?

## **B. FOUNDATION AND APPROACH IN RECONSTRUCTION OFFENSE ADULTERY**

Article 284 of the Criminal Code is the legal umbrella in the completion of acts of adultery. In enforcement, Article 284 of the Criminal Code raises many problems, so we can say that this article is problematic. If the enforcement of a law given rise to problems, will result in legal purpose can not be achieved, and therefore should have the law (in this case is Article 284 Penal Code) does not need to be enforced. On the contrary it can be said that Article 284 of the Criminal Code is not effective, for it should be done immediately renewal or reconstruction of the passage (Sudarto, 1983 : 18).

If the law can not bring benefit to the community and even led to problems in its enforcement, then the law should be refurbished. According to the concept of progressive law, if the law is problematic, it is not man who is forced to adjust the law, but is the law that must be changed to be improved, because basically the law is for man, not man for the law (Satjipto Rahardjo, 2006 : 4).

Similarly to Article 284 of the Criminal Code, not the people of Indonesia who have to adjust to the values underlying the article, but the article regarding the offense of adultery should be changed based on the values of the Indonesian nation. On the contrary it is then necessary to rule making rule breaking is then performed to Article 284 of the Criminal Code. Based on these explanations indicate that the reconstruction of the chapter on adultery is a necessity.

Urgency reconstruction of the offense of adultery can be explained by the arguments presented by Robert B. Seidman that explains that the laws of a nation can not simply be applied to other nations, because the law is always linked with its social base. There is a close relationship between the law and their communities (informal institutions). It was concluded that the laws of a nation can not simply be transferred to other nations (Suteki, 2007:1).

Similarly, the idea Sudarto, that value system of a nation is not the same so it can not be imposed on other nations, even he argued that criminal law concerning the values of human life, both concerning the human self to the values inherent in

## The Urgence of Reconstruction the Offense of Adultery in Indonesia

society. In this regard, the reconstruction of the offense of adultery with regard to the life and outlook of the nation Indonesia is very important (Sudarto, 1977 : 28).

Reconstruction of the offense of adultery should have been done since Indonesia's independence. As the opinion of Ruslan Saleh (1984 : 41) as saying that the law is a precipitate of values or norms that live in a society that is generally accepted by the public, contained in a series of legal rules. In accordance with the opinion of the Republic of Indonesia's first president Sukarno - who were reworded by Moeljatno- "that the law is nothing else than the expression of political ideals of the people (Moeljatno, 1985 : 2). also in accordance with the theory of Eugen Ehrlich and Tamanaha. Eugen Ehrlich said that the law should have been rooted in the values of life (Endang Sutrisno, 2009 : 26). The law is always rooted in a socio-cultural community specific. The law is always rooted in a "peculiar form of social life" (Rahardjo, 2008 : 105). Mirror Theory Thesis of Tamanaha said "Every legal systems and in a close relationship to the ideas, aim and purpose of society. Law Reflects the intellectual, social, economic, and political climate of its time " (Tamanaha, 2006 : 4).

Reconstruction of the offense of adultery is one manifestation of the development of law, especially criminal law. Development of criminal law should be based on the outline of the construction of national law as stipulated in Law Number 17 Year 2007 on the National Long-Term Development Plan (RPJPN) 2005-2025, in Section IV.1.3 of the Long-Term Development Directions 2005-2025, which among others states: "... legal development directed at increasing realization that solid National Legal Systems based on Pancasila and Undang-undang Dasar RI 1945, which includes the development of legal materials, legal structure, including law enforcement officials, facilities and infrastructure of the law (BAPPENAS, 2007 : 59).

In the description of the mission of the 2nd RPJP among others, that: "The development of legal materials directed to proceed with the update laws to replace legislation colonial heritage that reflects social values and interests of the people of Indonesia as well as to encourage the growth of creative and community involvement is very needed to support the implementation of governance and

national development based on Pancasila and Undang-undang Dasar RI 1945, which includes planning law, the legal establishment, the research and development of the law ".

The form of government policy is the integration of traditional values, culture and religion as the basis for the development of national laws can clearly be seen in the GBHN of the General Assembly of the National Unity Cabinet in 1999 as outlined in Chapter IV of the letters A to point 2, which stated: "Reforming national legal system that fully recognizes and respects the law and common law .... " (People's Consultative Assembly, 1999 : 68). GBHN are the Guidelines development including the development of law, therefore, use the guidelines as the basis for development of national law is one form of rational approach to the use of policy-oriented (policy-oriented approach) in the development of national laws.

Besides using RPJP and GBHN as the legal basis in the development of national law, be used also result from a variety of national legal seminars as the juridical basis. Of the various national legal seminar resulted in an agreement which provides that the national legal reform should use the cultural and religious approach. Even in the 8th national seminar of 2003 affirmed that religious values serve as a source of motivation, inspiration, substantive content and source evaluation (Nawawi Arief, 2011 :7).

Gustav Radbruch said, In a regulatory reform should be based on the ideals of law (*rechtsidee*). According to him the desired ideal of community law includes three things: certainty, usefulness and fairness (Huijbers, 1982 : 162). Therefore, in order to revise a rule, three things should be the main rationale for forming laws / regulations. In realizing the ideals of Gustav Radbruch law shall be conducted with due regard to the balance between legal certainty, the benefit of law and justice, so that substantive justice to be embodied in law reform can be achieved

In realizing the legal certainty can be done by creating a law in written form. While in realizing the benefits of the law for the public, the law should be able to meet the two interests, namely for the community and the individual, the interests

## The Urgence of Reconstruction the Offense of Adultery in Indonesia

of victims and offenders. During this law only consider the interests of the offender and the public interest.

For justice to be felt society then the law should be formed to realize the substantive justice instead of formal justice. According winner mensky in order to realize the substantive justice (mensky call it the perfect justice) then the law must be constructed by integrating the three sources of law, namely the legal source of religious / moral (religion law / morality), state law (state law), customary law (living law) (Menski, 2006 : 612).

According Satjipto Rahardjo, - which is termed the renewal of national law with the remodel and build Indonesian law - that the renewal of their national laws in accordance with the spirit of the nation (volkgeist) (Rahardjo, 2009 : XV-XVI). Indonesia, as for the soul of the nation, especially the Indonesian nation was formed, colored and controlled by the norm-morma religion, culture and humanizing behavior.

As stated in advance that justice be achieved in the construction of national law is not justice formal but a substantive justice. In this regard, the development of national law must be able to accommodate the values that exist in the community because of these values by society Indoneaia believed to be true and can realize the public wants justice. Those values come from religious norms and customs that have become Living Law in society.

As the theory of triangular concept of legal pluralism, otherwise known as legal pluralism proposed by Werner Menski, that in the realization of substantive justice is termed perfect justice, must integrate the balance of the elements of state positivism, society / socio-legal approach and religion / morality / ethics (Nawawi Arief, 2005 :9).

Based on the opinion of the Menski then in doing development of national criminal law must use a variety of approaches. As Pospisil opinion which says that the real law is the result of social interaction are influenced by aspects of the cultural, political, economic, social, religious, and others (Nurjaya, 2007 : 23).

To realize the substantive justice in the reconstruction of the offense of adultery also have to use the right approach. Scholars have repeatedly stressed in

various forums and seminars symposia national law, in order to perform the National Legal System Reform used a religious approach that is associated also with the approach of the cultural values and legal awareness in the society (customary law). It can be concluded that in the reconstruction of the offense of adultery that can create legal certainty, to have the benefit of and be able to realize substantive justice should be done by the cultural-religious approach or approaches legal pluralism.

Barda Nawawi Arief (2005 : 4-8) suggests the importance of customary law and religious law to be used as a basis for renewal of national criminal law, namely that the renewal of the criminal law must be done by using an approach that is oriented on the policy (policy oriented approach) and use values herein include human values (the humanist approach), the values of cultural identity (cultural approach), and moral values of religious (religious approach) (Nawawi Arief, 2005 : 3-4).

It can be concluded that the opinions Satjipto Rahrdjo and Barda Nawawi Arief on how to realize the substantive justice is no different to that stated by Werner Menski about legal pluralism, namely that in the realization of substantive justice (Perfect justice) should integrate the balance of the elements of state positivism, society / socio- legal approach and religion / morality / ethics. Furthermore Barda Nawawi Arief added that to accommodate the conditions and interests of the people of Indonesia, the basic idea in the reconstruction of the offense of adultery should be based on "the idea of balance", which includes (Nawawi Arief, 2006 :186-187):

1. Monodualistik balance between the public interest and the interests of the individual / individuals.
2. The balance between protection / interests of the offender (criminal individualisasi idea) and victims of crime.
3. The balance between the elements / factors "objective" (external work) and 'subjective' (person / spiritual / mental attitude) daad-dader idea Strafrecht.
4. The balance between formal and material criteria.



## The Urgence of Reconstruction the Offense of Adultery in Indonesia

5. The balance between legal certainty, flexibility / elasticity / flexibility and fairness);
6. Balance of national values and the values of global / international / universal.

Based on the principle of balance as the basic idea in the reconstruction of the offense of adultery, then the next step is how to implement the idea of balance in formulating a new offense of adultery.

Based on the value approach is used as the basis of law in the political reconstruction of the offense of adultery, then it should use the values of religious and traditional values as the basic idea. Suteki (2013 : 81-82) as the opinion that the institutionalization of return (re-Institutionalization) principles or norms into national law is the recognition of the existence of customary law and religious law. The need for institutionalization of customary law and religious law is due to traditional values and religious values inherent in society. According to the Indonesian people value religion and traditional values containing decency, fairness, certainty, and is believed to failure to comply / not running there will be a result, both real and unreal because the habit is in it has become deep soul consciousness.

Also added by Suteki with Paul Vinogradoff citing the opinion, that the law actually grew out of practices that run community members in establishing relations between the one with the others. Starting from this opinion and politics in relation to the law on the stage of the legal establishment of community actions in completing the act of adultery based on traditional values and religious values should have been institutionalized in a formal legal form.

### **C. VALUES AND NORMS AS THE BASIS FOR THE PROHIBITION OF ADULTERY IN INDONESIA**

Law is an institution for moral values or morals that guide the life of a nation to be adhered to, in order to achieve a better life. The implication of law in Indonesia must not conflict with the moral values of the Indonesian nation.

Obscenity pertaining to the institution of marriage, should be established into law. Inauguration obscenity into law aimed at creating legal certainty. legal certainty needed to give protection to the people of arbitrariness ruling. Decency

guide lines are always based on religious values prevailing in the society concerned. As Jean Bodin said that natural conditions and the religion of a nation will affect the legal system of a nation. Based on some of these opinions make clear that religion and values in the society, is the foundation / guidance in legal development of a nation (Soekanto and Salman, 1996 : 160).

One form of moral norms is the prohibition of adultery. In Indonesia, adultery normatively prohibited by the legal umbrella of Article 284 Criminal Code. Article 284 of the Criminal Code is a legal product of Dutch colonial government. Therefore, the value in Article 284 are the values of the Dutch nation. It often becomes a problem when people deal with adultery, because the rules used by society was religious norms and customs were different from the values in which article 284 Criminal Code. Religious norms and customs is the basic idea in determining the limits of decency offense while the offense of adultery is one of decency.

In setting limits or criteria for adultery as an offense based on the values of decency became a national collective agreement. In accordance with the opinion of JJ. Rousseau said that the law is a manifestation of the willingness with the community (L.Tanya, 2010 : 87). This means that in deciding one way or act as an offense should not just desire or interest in part or group of people alone, but should really wishes of the people together, in order to create order and welfare of the whole society.

Majority Indonesia Society to belief of Islam religion (Muslim society), so that the norms guidance and guidelines in live much influenced and inspired by Islamic law. That`s also the case in the completion of acts of adultery, the mindset and actions of muslim society inspired and based on Islamic law. In this regard, in reviewing the terms of the first proposed adultery is adultery according to the understanding of Islam.

In general terms and limits of adultery according to Islam norms is any sexual intercourse outside of legal marriage. In Islam values not look at whether the person can be called adultery is married or not. According to Islam norms and

## The Urgence of Reconstruction the Offense of Adultery in Indonesia

customs, those who are married or not, if intercourse outside of a legal marriage is adultery.

According to the Islam norms and customs intercourse not just lust. There are noble goals in intercourse, therefore, to do so should be through the process and conditions set forth in Islam norms and customs. In addition, the act of encouraging someone of adultery is also prohibited.

Definition of adultery is easier in his demonstration is based on the opinion of M. Quraish Shihab. He formulated the definition of adultery is contiguity of the two genitals of a different kind and are not bound by the marriage ceremony or ownership, and also due to the doubtful (vagueness) (Shihab, 2008 : 279).

The mufassirin from Religious Affairs of the Republic of Indonesia, formulated (Jubaedah, 2010 : 120) : "The act of adultery is sexual intercourse committed by a man with a woman outside of marriage, whether man or woman had ever had sexual intercourse lawful, nor yet in out of wedlock are legitimate and not by mistake ". Based on this interpretation, the adultery in the sense the term is sexual intercourse between a man with a woman who is not tied to each other in the marriage relationship. In this sense "sexual intercourse" is not described in detail, so it's very broad meaning. Based on the understanding of adultery shows that basically look at every relationship of Islamic law or mating sex outside marriage is adultery, whether the perpetrator is married or not.

Adultery understanding of different Islam that affect the public's understanding of adultery. Islam norms that form the viewpoint of the people of Indonesia on the meaning of adultery. Standpoint which is the living law for the people of Indonesia in dealing with adultery.

In order to understand the nature of Indonesian society which forbids adultery, so that it can receive and understand any form of action and the nature of Indonesian society to acts of adultery, it is necessary to know the basic philosophy of prohibiting adultery. Not enough if only to find out how the people of Indonesia in view of the institution of marriage, or the norms and values underlying

Living Law is obtained in a few places where research was conducted, Kudus, Pamekasan, and Bangkalan and other areas that researchers examined through give-news about the adultery of print, electronic and internet. The results of interviews with people in the study site showed the limits and terms of similar adultery with existing rules in Islam norms. According to the society, the prohibition of adultery is a form of difference between man and beast. In humans, sex is sacred, not just lust. according to the Indonesian people in general, that man was created by God as being the most glorious in comparison to other creatures, humans not only have lust but also equipped with morals and mind.

Implicitly prohibition of adultery in all four areas is actually a form of rejection of sex-free lifestyle that is contrary to the norms of society. Lifestyle free sex like animals. Healthy lifestyle makes a person vulnerable to sexually transmitted diseases. Venereal disease is a contagious disease that can be the offender, the offender's wife or husband, children and even society. The impact of general disease not only affects the physical health of patients, but also affect the spiritual health of the patient, so it will affect psychologically and morally in society. It could be argued the prohibition of adultery is a manifestation of the protection of physical and spiritual health of society.

The prohibition of adultery is also the implication it protects the rights of inheritance, because adultery causes unclear pedigree child, children only have lineage from his mother. This resulted in children born outside of a legal marriage not being given the inheritance of his father. Basically prohibition of adultery is also in order to protect the pedigree of a child, in which there are protection of the rights of life, growing rights, the right to education, the right of ownership for a child.

The prohibition of adultery is also aimed at maintaining harmony in the family, the honor of the family and society. Adultery is an act that defames the family, even the name of both the local community, because adultery by religion and public decency value is immorality / a discretion. Besides, those who are married adultery is a form of betrayal, broken promises, disloyalty and lack of respect their partner, causing mistrust that can lead to divorce. As for unmarried

## The Urgence of Reconstruction the Offense of Adultery in Indonesia

adulterers resulted in her negative view of society, which would damage the good name so that could destroy his future.

The prohibition of adultery as well to prevent the growth of prostitution. Prostitution is a disease of society. Increased prostitution will lead to disease of society, such as gambling, drunkenness. increased prostitution will lead to moral degradation of society, even the moral degradation of the nation.

According to mufassirin of Republik Indonesian Ministry of Religious Affairs, that the reasons for prohibiting acts close to adultery because adultery is a heinous act that results in damages, among others (Djubaedah, 2010 : t4-75):

1. The act of adultery that confounds the descent, which resulted in someone hesitant about their children, whether the child was born as a legitimate offspring or child of adultery. Alleged husband against wife of adultery with another man, can pose difficulties in terms of the legal position of the child in question. This can lead to delays in offspring survival and destroy the social order.
2. The act of adultery cause instability and anxiety among members of the public, due to not maintaining the honor. As a result of the occurrence of fornication many lead to a criminal offense against life or murder in society.
3. The act of adultery can destroy peace of home life. A woman or a man who has committed adultery stigmatization or stain families in the local community, thus giving rise to disharmony and there is no peace and there is no tranquility in the relationship householder's life, especially if adultery was conducted husband or wife is concerned.
4. The act of adultery can destroy the life of the household or the family concerned. That's because, the husband or wife of adultery means he has tarnished the household or family, so it will be difficult for the inevitable from broken homes.

Fadhel Ilahi in a book "At-Tadabir al Waqiyah Minaz Zina fil Fiqhil Islamy" which has been translated into Indonesian by the title of "Zina", has managed to collect a variety of research data in various parts of the world about the adverse effects of fornication as follows (Ilahi, 2004 : 42-61) :

1. The main cause venereal diseases.
2. Causing the destruction of the household.
3. Many gave birth to an illegitimate child.

The findings of Fadhel Ilahi and the opinions of the mufassirin Religious Affairs Republik Indonesia is no different from what researchers have found in general in Indonesian society, which is the cornerstone of the philosophy and the reasons for fornication is prohibited.

Based on the negative impacts of adultery, then the reconstruction of the offense of adultery based on the values of Indonesia which was based on religious norms and customs have to do. With the reconstruction was expected to be able to cope with acts of adultery, which means it will also prevent any negative impact caused by adultery.

Basically formalizing values that is behind the norm in a regulation / rule of law are the country's efforts to protect its citizens through legal certainty in order to realize justice in accordance with a sense of justice and protect the public from abuse (Huijbers, 1982 : 162).

#### **D. COMPLEMENTION ADULTERY ACTS IN INDONESIA**

Ius constitutum prohibition of adultery in Indonesia is is Article 284 of the Criminal Code. In essence Article 284 of the Criminal Code states that there has been adultery if one of the perpetrators or both are married legally, so that if both actors are not married legally, not adultery. in this article are regulated that can complain that there has been a husband or wife of adultery only offender.

The contents of the article is different from the rules contained in Islam norms that become guide the majority people of Indonesia. Therefore, the Indonesian community especially muslim society in completing adultery are not using article 284 Criminal Code. The law is not in accordance with the community, then the law must be overhauled adjusted to the values that live in the community. Similarly, Article 284 of the Criminal Code had to be reconstructed.

Based on the results of research of muslim societyin Kudus, Pamekasan, and Bangkalan, as well as reviewing the results of the news in the media, generally show the same results. First on the definition or limitation of adultery. adultery by

## The Urgence of Reconstruction the Offense of Adultery in Indonesia

public Indonesia (the majority are Muslims) is any sex or intercourse without legal marriage and the offenders anyone, including which of them is married or one married or unmarried both.

The second of the settlement process adultery. The results showed that the settlement process does not wait for a husband or wife offender complaints. Everyone can take action against offenders of adultery origin on behalf of victims. Victim of adultery, according to research not only the husband or wife of the offenders but also the family and the society in which adultery occurs

The third, based on research results, the sanctions imposed on adultery even though the details differ in size but are generally the same shape, namely sanctions exile, social sanction offenders shamed and fined. The purpose of sanctions in each region in general is the same, namely to give deterrent effect to the offenders, protect the interests of victims and restore the natural macro cosmos and micro-cosmos that marred due to adultery. in principle in a sanction based on the principle of balance, which is to consider the interests of offenders and victims, the interests of individuals and society, the natural interest of macrocosm and microcosm.

The victim of the offense of adultery by the Indonesian people not only the husband or wife of the offenders. This understanding is based on the communal nature of the Indonesian nation. as well as in marriage. According to Indonesian society, marriage is not only an individual bond, but also the bonds between families and between communities. Therefore, victims of adultery also includes the family and society as adultery is one of the actions that undermine marriage.

Muslim communities in Kudus district, Pamekasan, Bangkalan is a communal society (Wignjodipoero, 1968 : 68) as Indonesian society in general. It was very influential on the views, ways, systems and processes mating. Marriages according to Indonesian people in general not only the relationship between individuals, but a relationship that involves the whole family and even engage community members of each party. therefore one of the purposes of marriage in Indonesian society is to maintain good relations between groups of relatives or family in a broad sense (Gautama, 1968 : 122-149).

In Islam, marriage is a sacred bond (*mistaqan ghalidan*) (Rohmad, 2012 :6), associated with these two pillars of Islam define marriage to maintain the sanctity of marriage. If the pillars of marriage are not met then the marriage is not valid. Islamic religion makes marriage as the foundation of family life. In addition, according to Islam marriage is a form of worship. In the Muslim community, the selection of a spouse involves the whole family. Based on it can be seen that marriage in Islam is not only the bond individual but the bond between a large family.

In the religion of Islam, marriage is a sacred institution that must be respected and guarded her chastity. Therefore, if there are parties who defiles the sanctity of marriage, the parties involved in the institution of marriage will react. The parties are not only the husband or wife, but also his extended family, even the community is also partly responsible, with the aim to restore the honor and sanctity of the institution of marriage. The participation of the whole community in addressing the desecration of the institution of marriage can be understood as any stage in the mating process always involves the community.

Understanding the meaning of marriage and the institution of marriage for Muslim community in Indonesia, it is understood that adultery is as one of the acts that tarnish marriage and kinship system damage. To that can be understood and accepted that adultery is a despicable act and a socially prohibited by the people of Indonesia. Becomes "normal" if the "crack" in the event of acts of adultery not only the spouse (husband / wife) but all members of society, even those "entitlement" to "prosecute" adultery. That is because every member of the family, even every member of the community is responsible and has an obligation to maintain the integrity, sanctity and honor the institution of marriage.

In addition, by understanding the system, the manner and process of marriage adopted by the Muslim community in Indonesia, obtained a justification that in completing the act of adultery did not have to wait for a complaint from a spouse or keluarga of adultery. This is the basis not use Article 284 of the Criminal Code in accomplishing acts of adultery, as in the aforementioned article of the offense of adultery is a crime complaint. This means that authorities can take action



## The Urgence of Reconstruction the Offense of Adultery in Indonesia

against perpetrators of adultery if there is a complaint from the spouse or a family party of adultery.

Understanding the meaning of marriage and understand the stage as well as the mating process to be followed in Muslim societies can be interpreted protection in sexual intercourse. It also means that the sexual relationship is something sacred, and therefore to do so must meet several requirements / rules and mealui several stages, so that if there are people doing sexual relationship does not meet the rules and not through the stages that should be passed so that people can do the action because the damage / violates the existing order in society.

In the Islam norms, which prohibited not only fornication but approaching the adultery act also prohibited. This affects the process of resolving cases of adultery. According to the research, people do not have to know the intercourse to be able to take action. If people know there is indication or deed indicating that it will happen or has happened adultery, the community can take action.

The difference is caused between the interests protected by Article 284 of the Criminal Code prohibition of adultery in Islamic law is different. In Article 284 of the Criminal Code which seeks to protect only the institution of marriage, whereas in Islamic law not only protects the institution of marriage alone, but also protects the sexual morals of society. In addition, the difference is also due to differences in views on the institution of marriage between people of Indonesia, especially the Muslim community with the Dutch point of origin of the Criminal Code. As the Qur'an Surah Al-Isyrah paragraph 32, namely: "And do not ever approach fornication, adultery is indeed a heinous act, disrespectful and bad roads". In the interpretation put forward by M. Quraish Shihab (2002 : 458-459), that do not approach adultery by doing things, even in the form of fantasizing that can lead you to fall into disrepute. The restraining order also implies a prohibition to not fall into seduction something potentially usher to do this step. Based on the results of the study, three things have become living law in Indonesian society, so that people feel to get justice when using it.

In the Islamic prohibition of actions that cause a person commits adultery not only in the Qur'an only, in the hadith is also contained the ban. Based on several verses in the Qur'an and hadith can be seen that Islam not only prohibits adultery but also prohibit things that encourage / influence / plunges someone to commit adultery. The sanctions for adultery according to Islamic law stipulated in the Qur'an Surah An-nur paragraph 2 that the two actors whipped hundredfold witnessed by a group of people who believe.

Described in the Hadith the prophet Muhammad that the punishment of stoning for adultery were ever married, both men and women if there is evidence of real and / she has been pregnant or own admission. While adulterer who had never married the Prophet impose flogging one hundred times and exiled for a year (Zainuddin, 2007 : 47). Islam is the religion followed by 90% over the Indonesian nation, therefore the values of the Islamic religion is very influential on the norms of the Indonesian nation. Similarly, regarding sanctions against adultery in Indonesian society is influenced by Islamic law. Basically sanctions against the Islamic law adultery is corporal punishment, social sanctions (humiliated), and seclusion.

Based on the results of research in several regions in Indonesia as well as based on the assessment of some of the news in that generally the completion of adultery did not have to wait for a complaint of a husband or wife offender. Society should not be viewed directly intercourse committed by the offenders. Community to act on their instructions / evidence approaching adultery deed / will occur or has occurred fornication. Community in the prosecution does not have to determine whether the offender in a legal marriage or not. The final form of the resolution or sanctions given to the offenders is also not at all as stated in Article 284 of the Criminal Code. Sanctions / measures granted to the offenders more on corporal punishment, social and permaluan sanctions and fines.

Of the various forms of settlement and sanctions imposed against acts of adultery in Indonesian society, in general there is some form of sanctions which are complementary in the community. The sanctions are sanctions exile, moral sanction, and subject to a fine (sanction accountability). Sanctions exile meant

## The Urgence of Reconstruction the Offense of Adultery in Indonesia

that the offenders was dirty / sin that must be isolated so as not to pollute the region and to restore the good name of the area. Sanctions moral sanction are intentions that adultery is damaging the moral / morals, then to restore moral / character actors to be good back then the offenders need to be humiliated in order not to repeat his actions again. Penalty aims to restore the natural balance has been torn apart. This natural balance of nature can be seen in the microcosm and the macrocosm of nature, natural microcosm is nature the family, while of the macrocosm is society. Therefore, payment of fines can be given to the family or to the public interest.

### **E. CONCLUSIONS**

Based on the research findings can be conclusions as follows:

1. The Indonesian Muslim society to interpret adultery is any sexual intercourse outside of marriage is legitimate, whether the perpetrator is married legitimate or not legitimate. Community action, do not have to know firsthand the act of intercourse, but enough with the instructions or actions that indicate will occur or has occurred adultery, people can take action against the perpetrators. community action should not wait for a complaint from the victim or her family. Reactions or actions done by society to adultery among other sanctions seclusion / expulsion, *permaluan* (moral sanction), and subject to a fine (sanction accountability). Sanctions exile meant that the perpetrator was dirty / sin that must be isolated so as not to pollute the region and to restore the good name of the area. Sanctions *permaluan* (moral sanction) are intentions that adultery is damaging the moral / morals, then to restore moral / character actors to be good back then the perpetrators need to be humiliated in order not to repeat his actions again. Penalty aims to restore the natural balance has been torn apart. This natural balance of nature can be seen in the narrow and broad nature, natural narrow is the family while the broad nature are public. Therefore, payment of fines can be given to the family or to the public interest.
2. There are several factors that make Article 284 of the Criminal Code is not effective in tackling acts of adultery in Indonesia. First philosophically

underlying value of the article is not in accordance with the values of society are believed to Indonesia, the value of underlying Article 284 of the Criminal Code is individualistil-liberal, while the underlying values of Indonesian society is a religious-communal. This resulted in the elements of the offense in Article 284 of the Criminal Code can be used against acts by public Indonesia as a criminal offense. Secondly, the sanctions in Article 284 only pay attention to the actors and neglecting the victims, while the Indonesian people in giving sanction upholds the principle of balance, meaning that not only pay attention to the side of the perpetrators but also pay attention to the interests of victims. In addition, the sanctions are not only aimed at individual interests, but also consider the interests of society, because the victim of an act of adultery is not just a single individual, the general public is also harmed.

3. The offense of adultery contained in Article 284 of the Criminal Code had to be reconstructed. It is based on the fact that the article is not effective, and the article is kriminogen or the cause of various other offenses. Articles are often led to conflict in society. Values protected under that article only institution of marriage, whereas the values protected under the prohibition of adultery in broader Indonesian society, among others: the institution of marriage, sexual morality of society, ancestry, inheritance rights, physical and spiritual health, and kinship.

## BIBLIOGRAPHY

- Huijbers, Theo, *Filsafat Hukum dalam Lintasan Sejarah*, Yogyakarta: Kanisius, 1982
- Ilahi, Fadhel, *Zina*, (terj.), Jakarta, Qisthi Press, 2004
- L.Tanya, Bernard, Yoan N.Simanjuntak, Markus Y.Hage, *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi*, Yogyakarta : Genta Publishing, 2010
- Menski, Werner, *Comparative Law in A Global Context, the legal system of Asia Afrika*, Cambridge University Press, 2006
- Moeljatno, *Fungsi dan Tujuan Hukum Indonesia*, Jakarta : Bina Aksara, 1985
- Nawai Arief, Barda, *Pornografi Pornoaksi dan Cybersex-Cyberporn*, Semarang: Pustaka Magister, 2011
- Rahardjo, Satjipto, *Membedah Hukum Progresif*, Jakarta: PT Kompas Media Nusantara, 2006
- , *Membangun dan Merombak Hukum Indonesia Sebuah Pendekatan Lintas Disiplin*, Yogyakarta: Genta Press, 2008
- , *Membangun dan Merombak Hukum Indonesia*, Yogyakarta: Genta Publishing, 2009
- Saleh, Roeslan, *Segi Lain Hukum Pidana*, Jakarta: Ghalia Indonesia, 1984
- Shihab, M. Quraish, *Tafsir Al-Mihsbah Pesan, Kesan dan Keserasian Al-Qur'an*, Volume 7, (Jakarta: Lentera Hati, 2002
- Soekanto, Soerjono and R. Otje Salman, *Disiplin Hukum dan Disiplin Sosial*, Jakarta: Raja Grafindo Persada, 1996
- Sudarto, *Hukum dan Hukum Pidana*, Alumni: Bandung,, 1977
- Sudarto, *Hukum Pidana dan Perkembangan Masyarakat Kajian terhadap Pembaharuan Hukum Pidana*, Bandung: Sinar Baru, 1983
- Suteki, *Integrasi Hukum dan Masyarakat*, Semarang: Pustaka Magister, 2007
- Sutrisno, Endang, *Bunga Rampai Hukum dan Globalisasi*, Yogyakarta: Genta Press, 2009
- Tamanaha, Brian Z., *A General Jurisprudence of Law and Society*, Oxford: OxfordUniversity Press, 2006
- Zainuddin, *Hukum Pidana Islam*, Jakarta: Sinar Grafika, 2007
- Kementerian Negara Perencanaan Pembangunan Nasional/BAPENAS, *Undang-undang Nomer 17 Tahun 2007 about Rencana Pembangunan Jangka Panjang Nasional Tahun 2005-2025*
- Ketetapan-ketetapan MPR RI Result Sidang Umum (Kabinet Persatuan Nasional) dan GBHN 1999-2004*, CV. Jakarta: Tamita Utama, 1999

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