

The Renewal Policy of the Adultery Concept in Article 411 of the Law Number 1 of 2023 on the Indonesian Criminal Code

Mas Putra Zenno Januarsyah^{*}, Dwidja Priyatno^{**}, Somawijaya^{***}, Widiada
Gunakaya^{****}

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Abstract

At present, Indonesia needs to update the Indonesian Criminal Code to replace the Dutch Colonial Criminal Code that still exists. The jurists, especially criminal law experts, have been involved in a lengthy debate on overhauling, reformulating, revising, and even reforming the Criminal Code to align with Indonesian values. This study aims to determine the foundation of the policy to expand the concept of adultery and the values protected by the expansion contained in Article 411 of Law Number 1 of 2023 on the Criminal Code. This study was a descriptive study that used a normative juridical approach. The data collection techniques employed secondary data with a study of documents. The data were analyzed with qualitative methods. The result shows that the foundation of the expansion policy is the perspective of criminal policy. The formulation of the adultery offense in Article 284 of the Criminal Code is a problematic policy because it is not in accordance with the values of the Indonesian people. The formulation of the article only convicts the offenders who are committed in marriage. The provision does not require punishment to unmarried convicts. The arrangements for adultery offenses that are still in effect today are not based on a view of life. They do not reflect the social structure of the Indonesian people with the characteristics of kinship, groups, and beliefs. On the other hand, Article 411 of Law Number 1 of 2023 on the Criminal Code expands the concept of adultery to protect the religious and moral values closely related to Pancasila.

Keywords: criminal code, criminal law reform, expansion of the adultery concept.

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^{*} Lecturer of the Department of Criminal Law, Sekolah Tinggi Hukum Bandung (the Bandung Law College), Jalan Cihampelas Number 8 Bandung, S.H. (Bandung Law College), M.H., Dr. (Padjadjaran University), putrazenno@gmail.com.

^{**} Professor of Criminal Law, Sekolah Tinggi Hukum Bandung (the Bandung Law College), Jalan Cihampelas Number 8 Bandung, S.H. (Bandung Law College), M.H. (University of Indonesia), Dr. (Parahyangan Catholic University), dwidjapriyatno@yahoo.co.id.

^{***} Lecturer of the Department of Criminal Law, Padjadjaran University, Jalan Dipatiukur Number 35 Bandung, S.H. (Padjadjaran University), M.H. (Diponegoro University), Dr. (Padjadjaran University), somaunpad@yahoo.co.id.

^{****} Lecturer of the Department of Criminal Law, Sekolah Tinggi Hukum Bandung (the Bandung Law College), Jalan Cihampelas Number 8 Bandung, S.H. (Bandung Law College), M.H. (University of Indonesia), Dr. (Parahyangan Catholic University), gunakaya.widiada@gmail.com.

A. Introduction

There are many expectations that the Indonesian criminal code will introduce many new changes. One of the expected changes is the regulation of the adultery offense contained in Article 284 of the Criminal Code which is still in effect today. This article identifies adultery as a Dutch term *overspel*. The definition is much narrower than the definition of adultery.¹ Based on the article's provision, the offender who committed adultery is one or both of the perpetrators bound in marriage. The offense of adultery cannot be imposed on sexual activity between unmarried couples.²

The current provisions regarding adultery in the Criminal Code do not align with the common concept generally accepted by the Indonesian people. The Indonesians are communal and religious. Every form of adultery is an abominable act that is prohibited in Indonesia, either committed by a married or unmarried couple. For example, religious values play a central role in constructing moral values for a group of people to form a basic understanding of moral norms as a self-reflection of the Indonesian people who uphold Pancasila, including the values contained therein, which will later be used as a standard that objective. The values of decency make humans intelligent creatures. These values make humans different from other living creatures.

Most Indonesians believe humanity bears a great responsibility to the Creator (God). Being a human does not only make someone uphold existence as a being but also makes someone required to fulfill moral obligations. Therefore, the Indonesian people also uphold the second precept, namely a just and civilized humanity. The Indonesian people recognize and live up to the noble values that exist in every human person and regard them as part of God's creation to be appropriately maintained.³ Based on the culture of the Indonesian people which has the characters of kinship, group, and belief, therefore, adultery does not only concern the problems and liberties of each individual, but also relates to the interests of many people, in this case, society and the values it adheres to.⁴

Belief principles include rules that are intended to help regulate a human person by controlling what he believes.⁵ In Indonesia, every religion prohibits the act of adultery because it violates religious and moral values. The principles of decency are the fundamental principles that form the foundation. They can be put forward by a view of behavior or attitude, that a person must have good morals.⁶

¹ Eko Sugiyanto, Pujiyono, and Budhi Wisaksono, "Kebijakan Hukum Pidana Dalam Upaya Penanggulangan Tindak Pidana Perzinahan," *Diponegoro Law Journal* 5, no. 3 (2016): 2.

² Zulfiqar Bhisma Putra Rozi, "Perkembangan Delik Zina Dalam Yurisprudensi Hukum Pidana," *Veritas et Justitia* 5, no. 2 (2019): 287, <https://doi.org/10.25123/vej.v5i2.3612>.

³ Purnadi Purbacaraka and Soerjono Soekanto, *Perihal Kaedah Hukum* (Bandung: Citra Aditya Bakti, 2018), 16.

⁴ A. Widiada Gunakaya and Mas Putra Zenno J., *Politik Hukum Pidana 'Perspektif Pembaruan Hukum Pidana Dalam RKUHP'* (Malang: Setara Press, 2021), 104.

⁵ Purnadi Purbacaraka and Soerjono Soekanto, *Perihal Kaedah Hukum*, 12.

⁶ Purnadi Purbacaraka and Soerjono Soekanto, 15.

In line with the argument, on December 6, 2022, the Indonesian Government and Parliament have ratified the Draft of the Criminal Code into law. It is the Law Number 1 of 2023 on the Criminal Code. The rejuvenation of the Criminal Code was carried out based on the characteristics of the state of Indonesia, which is different from the Netherlands. The previous criminal code was established by the Dutch colonial government. Previously, the jurists, especially criminal law experts, have involved in a long debate on overhauling, reformulating, revising, and even reforming the Criminal Code to be in line with the Indonesian values. The ratification and promulgation of the National Criminal Code is one of the efforts to reform national law. An effort is a form of thinking of the people who wish to have the real National Criminal Code.

In line with the discussion, it is necessary to observe carefully that there are at least two objectives in criminal law reform. First, the internal objective is intended to protect and prosper the Indonesian people. Second, the external goal is intended to contribute to world peace due to the rapid development of international crimes.

The problems of the present stem from the provision of adultery. The provision has experienced a concept expansion. Previously, the provisions are in Article 411 of the National Criminal Code as follows.

1. Any person who does intercourse with someone who is not his/her spouse shall be punished for adultery with a maximum imprisonment of 1 (one) year or a maximum fine of category II.
2. On the crime referred to in paragraph (1), no prosecution is carried out except for complaints from:
 - a. Spouse of the offender who is bound by marriage.
 - b. Parents or children of the offender who is not bound by marriage.
3. The provisions referred to in Articles 25, 26, and 30 do not apply to complaints as referred to in paragraph (2).
4. Complaints can be withdrawn if the examination at the trial court has not started.

In line with the formulation, Article 411 paragraph (1) of the National Criminal Code explains the meaning of "not husband or wife" as

1. a man who is in a marriage has intercourse with a woman who is not his wife;
2. a woman who is in a marriage has intercourse with a man who is not her husband;
3. a man who is not in a marriage has sexual intercourse with a woman, even though it is known that the woman is in a marriage bond;
4. a woman who is not in a marriage has sexual intercourse with a man, even though it is known that the man is in a marriage bond; or
5. a man or a woman, each of whom is not bound by marriage, have intercourse.

Article 411 of the National Criminal Code underwent an expansion of the concept which initially only prohibited acts of adultery against married people. It also prohibits acts against people who do not have a husband/wife (unmarried) to be prosecuted or subject to criminal sanctions. The revision to the adultery provision in the National Criminal Code still causes differences of opinion in various circles: some parties agree and some also disagree with the revision. The criminalization of an act should be coordinated with the criminal politics of the Indonesian, including the extent to which an act is considered in accordance with the basic values of society.

Based on the examination, the expansion of the concept of adultery is needed because the rise of the number of sexual relations that are extramarital or without any official ties, either religiously or legally. In addition, the Dutch colonial Criminal Code has not accommodated acts prohibited by religious norms. Because of the limitations, the National Criminal Code regulates the act of adultery.

The efforts to make and formulate a good Criminal Law, especially regarding the determination of criminalization policies, require several approaches. The approaches are needed in determining the related policies. The approach must still reflect the characteristics of criminal politics, namely rationalization.⁷ The rational criminal politics is oriented towards two aspects: the policy approach and the value approach. Criminal law politics becomes something that cannot be separated from criminal politics, which must also be aimed to policy and value in determining criminalization and penalization policies. Both policies are central issues in criminal politics toward penalization.⁸ On the other hand, the perspective of a policy approach is related to the values that consider the objectives of criminal law. Bassiouni believes that the intention of criminal law is usually fulfilled in social interests containing specific values to be saved.⁹

Therefore, this study aims to examine the issue of criminal law renewal policies. The focus is the expansion of the concept of adultery in Article 411 of the National Criminal Code. The study also aims to determine the foundation of the policy to expand adultery crimes and the values protected by expansion. In addition, there are polemics within society regarding the expansion of the concept of adultery. Some people think that the formulation of Article 411 of the National Criminal Code has crossed the boundaries of privacy matters of citizens. There is also a concern that the expansion will affect the tourism sector leading to foreign tourists afraid to visit Indonesia.

⁷ A. Widiada Gunakaya and Mas Putra Zenno J., *Politik Hukum Pidana 'Perspektif Pembaruan Hukum Pidana Dalam RKUHP'*, 85.

⁸ A. Widiada Gunakaya and Mas Putra Zenno J.

⁹ A. Widiada Gunakaya and Mas Putra Zenno J., 95.

B. Determination of Policy Basis to Expand the Concept of Adultery Crime in Article 411 of the Law Number 1 of 2023 on the Criminal Code

Hamza states that the decency offense included in it is the adultery offense. It is part of the criminal law which is not neutral and differs in each country. The opinion refers to the argument that the religious and moral values of a nation heavily influence the adultery offense. Of course, each nation has unique characteristics. It is also in line with the reality in Indonesia that the regulation on adultery offenses is increasingly getting more attention in terms of formulation.¹⁰

Furthermore, Soesilo states that adultery is an act of intercourse committed by a man and a woman who is already married.¹¹ To fulfill the element, sexual relations occur if the parties do it because they both like it, and there is no coercion from the other party. Soesilo's opinion aligns with the notion of adultery in Article 284 of the current Criminal Code. It states that adultery is an act of intercourse between a man and a woman, one of whom is married (a husband/a wife). The sexual intercourse occurs because the parties want it. The article explains that adultery must be done intentionally.¹²

Currently, Indonesia has reformed the Criminal Code as an effort to reform national law. One of the efforts to update the Criminal Law is by expanding the concept of adultery. The offense of adultery was accommodated by *Wetboek van Strafrecht* during the Dutch colonial period. The basis for the punishment is because the laws and regulations of the Netherlands consider adultery (Dutch: *overspel*) as an act that betrays a marriage. The principle of absolute monogamy in *Burgerlijk Wetboek* *mutatis mutandis* does not allow married couples to have sexual relations other than with respective legal partners because adultery is considered an act that destroys the sacred bonds of marriage. It surely makes legal partners feel disadvantaged. In the formulation of Article 284 of the Criminal Code, there are at least three essential elements: (1) the act of intercourse carried out by men and women who are not legitimate pairs (spouses); (2) the perpetrators are subjects of Article 27 *Burgerlijk Wetboek*; and (3) the perpetrators are bond in marriage with other individuals.

Initially, Article 284 of the Criminal Code was equivalent to Article 241 of the *Ned. WvS* (Dutch Criminal Code). However, the Dutch have deleted the article since 1971. Based on the views of the Dutch people, the type of crime is a crime without a victim (victimless crime). Almost all countries in Western Europe have abolished the offense. Japan and China do not have a chapter on decency. In the case of rape, they include it in the crimes against human bodies. The term that is suitable for

¹⁰ Andi Hamzah, *Delik-Delik Tertentu (Speciale Delicten) Di Dalam KUHP* (Jakarta: Sinar Grafika, 2015), 164.

¹¹ Wahyudin Naro (et.al.), "Shariah Assessment Toward the Prosecution of Cybercrime in Indonesia," *International Journal of Criminology and Sociology* 9 (2020): 580, <https://doi.org/10.6000/1929-4409.2020.09.56>.

¹² Hardianti Ashari and Hamzah Hasan, "Kriminalisasi Terhadap Perempuan Dalam Makna Perzinaan: Studi Komparasi Antara Sistem Hukum Positif Dan Pandangan Ulama Mazhab," *Jurnal Ilmiah Mahasiswa Perbandingan Mazhab* 3, no. 1 (2022): 27, <https://doi.org/10.24252/shautuna.vi.23228>.

translating *overspel* (Dutch) is surface. The term *adultery* is a general term. It means that all sexual relations outside of marriage are acts of adultery but not necessarily premarital sexual intercourse.¹³

Article 284 paragraph (1) of the Criminal Code is more accurately called the term dishonest, not adultery. Article 284, paragraph (1) 1 explains that a married person commits adultery with a married or unmarried person. However, for men who do not apply to him Article 27 Burgelijk Wetboek, he is subject to customary law or Islamic law. Therefore, he cannot be punished because Muslims are permitted to commit polygamy. However, if a married woman performs an *overspel*, there are no exceptions. Islamic law even arranges the punishment to be stoned to death. In Islam, all forms of sexual relations outside of marriage are crimes, all of which are considered acts of adultery.

Article 284 paragraph (1) also includes men and women (married or unmarried), who participate (*medeplegen*) with married individuals. A man who commits adultery with a married woman, as referred to in Article 284 paragraph (1) 2nd letter a, then the man is not an exception. The same is also valid for a woman. Therefore, a Muslim man who is not subject to Article 27 of the *Burgelijk Wetboek* who commits adultery with a married woman, whomever it is (Muslim or Christian or other), is also subject to Article 284 of the Criminal Code. Likewise, unmarried women who participate (*medeplegen*) with married men are also subject to the article. Therefore, an unmarried Muslim woman who does not comply with Article 27 Burgelijk Wetboek, who commits adultery with a married man, is also subject to Article 27 Burgelijk Wetboek. Henke provides an example: A European wife complained about her husband who committed adultery with a native woman. The European man was considered the perpetrator (*pleger*), and the native woman as participating (*medepleger*) in the offense. However, if a Muslim woman, who is unmarried and does not comply with Article 27 of the Burgelijk Wetboek, commits adultery with a married Muslim man, she cannot be punished.

The offense of adultery is an absolute complaint offense (*absolute klachtdelicten*). Within six months, the complaint must be made by the husband or the wife of the adulterer in accordance with the formulation of the offense. It means that even though adultery has occurred as referred to in Article 284 paragraph (1) of the Criminal Code, the perpetrator still cannot be charged if there are no complaints from the spouse concerned. Then, the perpetrator subject to Article 27 of the Burgelijk Wetboek must complete the complaint with a divorce suit to court within 3 (three) months from the time the report was made.

The determination of the offense of adultery as a complaint offense is considered inappropriate because it refers to the people's values. Most people view adultery as not only a personal matter and one's freedom. They also consider adultery as an act related to societal norms and interests. On the other hand, a

¹³ Andi Hamzah, *Delik-Delik Tertentu (Speciale Delicten) Di Dalam KUHP*, 169.

marriage bond is not only a relationship between someone who has an interest, but it is also related to the kinship relationship between the two families of the parties, even related to environmental relations.¹⁴

Article 284 of the Criminal Code is basically no longer enforceable. This is because there have been many discrepancies between *das sollen* and *das sein* within society regarding legal and regulatory aspects, law enforcement, facilities or facilities, community and cultural aspects.¹⁵ Adultery ruins the sanctity of marriage. It is no longer a personal matter but has already been in the public interest. Therefore, the perspective of the policy to determine adultery offenses as complaint offenses, as Article 284 of the Criminal Code, is very unwise. It also does not support the objective of crime prevention. It is like allowing someone (especially husbands) to feel the freedom to commit the crime of adultery, especially in a society where most wives are weaker than husbands. On the other hand, the policy can lead to other offenses, such as abortion and prostitution.

Based on the perspective of criminal sanctions, the offense of adultery is classified as a mild offense. Article 284 of the Criminal Code threatens perpetrators with a maximum prison sentence of nine months. Indeed, it is a very light criminal sanction to the perpetrator compared to the fact that most Indonesians consider adultery a disgraceful act that can endanger marital relations. It can injure the sense of justice, and as a result, the community will act arbitrarily to judge the perpetrators of adultery themselves because they feel unprotected.

Next, the expansion of the adultery concept in Article 411 of the National Criminal Code criminalizes extramarital sexual relations if the sexual relations are carried out by unmarried individuals. Based on the perspective of a value approach, the expansion has been in line with the moral values of the Indonesian religious people.

Mulder argues that criminal law policy determines (1) the extent to which existing criminal law provisions need to be reformed; (2) things that can be done to prevent the occurrence of a crime; and (3) determining the manners of investigations, prosecutions, trials, and criminal.¹⁶ On the other hand, Soedarto argues that legal politics is.

1. to try creating a useful law and regulation, which is appropriate to certain situations and conditions; and
2. state policy through institutions that have the authority to pass the desired laws and regulations, which are expected to be used to express things contained in people's lives and to realize what is desired.¹⁷

¹⁴ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Bandung: Citra Aditya Bakti, 1996), 284.

¹⁵ Sahran Hadziq, "Pengaturan Tindak Pidana Zina Dalam KUHP Dikaji Dari Perspektif Living Law," *Jurnal Lex Renaissance* 4, no. 1 (2019): 43, <https://doi.org/10.20885/JLR.vol4.iss1.art2>.

¹⁶ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, 28-29.

¹⁷ Sudarto, *Kapita Selekta Hukum Pidana* (Bandung: Alumni, 1981), 159.

In line with these ideas, Arief states that the politics of criminal law is a kind of step to initiate and to formulate law and regulation of criminal offenses for the sake of the society.¹⁸ Based on the meaning of "policy", there are several notes that need to be known as follows.

1. The definition can be reviewed based on the perspective of criminal politics. It is understood that the use of criminal law is a means of penal or penal efforts to overcome crime. Thus, from the perspective, the politics of criminal law is nothing but a rational attempt by society to prevent criminal acts through the making and formulation of a good criminal code.
2. If the political definition of Criminal Law is explained further, the policies that must be stipulated in the framework of making and formulating good Criminal Law are related to issues of material Criminal Law study. They include:
 - a. Policies on the determination of criminal acts;
 - b. Policies on the determination of criminal responsibility;
 - c. Policies on the determination of crime and sentencing; and
 - d. Policies on the determination of the implementation of the criminal charges.¹⁹

Renewal of criminal law will not occur if the view that underlies the value of a criminal law is the same as the value of the criminal law inherited from the Dutch (*Wetboek van Strafrecht*); and ignores the aspired values of the criminal law. Therefore, criminal law reform should be made using a policy and value approaches. The reforms of criminal code should be based on the Pancasila values. It is the foundation of life of the people that has been aspired so far. The values are extracted from the Indonesian people themselves. The values have a balance in, among others, religiosity, humanistic, nationalism, democracy, and social justice.²⁰

Bassiouni says that the goal to be realized by the penal law, in practice, can be seen from the social interests with protected certain values: (1) the social interest is the maintenance of society; (2) protection for citizens from crime, loss or unjustifiable harm committed by other people; (3) resocialization of law enforcement; and (4) maintenance of the integrity of certain basic views on social justice, human dignity, and individual justice.²¹

Furthermore, the punishment must be adjusted to the needs and interests that are beneficial to society. On the other hand, the imposition of criminal sanctions must comply with the limitations that already exist in society. Based on this vision, Bassiouni believes that discipline in a criminal justice system is not only pragmatic in nature but also must be value-oriented discipline.²²

¹⁸ A. Widiada Gunakaya and Mas Putra Zenno J., *Politik Hukum Pidana 'Perspektif Pembaruan Hukum Pidana Dalam RKUHP'*, 38.

¹⁹ Barda Nawawi Arief, *Pembaruan Hukum Pidana Dalam Perspektif Kajian Perbandingan*, 35-36.

²⁰ Barda Nawawi Arief, 4.

²¹ A. Widiada Gunakaya and Mas Putra Zenno J., *Politik Hukum Pidana 'Perspektif Pembaruan Hukum Pidana Dalam RKUHP'*, 96.

²² A. Widiada Gunakaya and Mas Putra Zenno J., 96-97.

Discussing criminal politics (policies), Sudarto briefly argues that criminal politics is a rational attempt by society to eradicate criminal acts (crimes). The intended rational effort can be carried out in two ways: by means of penal (criminal law) and non-penal (non-criminal law). The implementation is an integrative unit that is inseparable and interconnected with the larger policy: the social policy.²³ Anel argues that “*criminal policy is the rational organization of the control of crime by society*”. Hoefnagels says, “*Criminal policy is the rational organization of the social reaction to crime*”.²⁴

Based on the ideas, it can be inferred that criminal politics is the same as criminal policy. Both has the meaning of policy to prevent crime by seeking or making and formulating good (rational) criminal laws. In this regard, from the perspective of criminal politics, efforts to prevent crimes are carried out by creating and formulating rational criminal laws. It is integral to efforts to protect society or social defense. Social defense is also an integral part of social policy, which can be interpreted as a rational effort to create prosperity in society.

The formulation of Article 411 of the National Criminal Code has accommodated the concept of adultery. The formulation of Article 411 of the National Criminal Code no longer discriminates the acts of adultery, whether committed by married or unmarried perpetrators. Therefore, the act of adultery committed by any individual, either married or unmarried, can be regarded as an act of adultery. The perpetrator can be subject to criminal sanctions as stipulated in the legislation later.

Most Indonesians consider every form of adultery as a dangerous social disease.²⁵ Kartono says that adultery is the same as prostitution because they both are like promiscuity (irregular sexual relations).²⁶ Therefore, adultery is a very serious social problem in the eyes of most Indonesians because it contradicts the value of decency, causes HIV/AIDS, destroys family relationships, and brings other negative impacts.²⁷

The first precept of Pancasila is the Belief in One Almighty God. It is the basis for the formulation of Article 29 of the 1945 Constitution. The article is the foundation of the religious life of Indonesian society. Consequently, religious matters are very sensitive. On certain occasions, the Indonesian people are very easily moved to incorporate religious elements into the legal system, including in offenses of decency.²⁸ Based on the description, the expansion of the adultery concept in Article 411 of the National Criminal Code is appropriate. It reflects the values of the Indonesian people, including social and cultural values.

²³ Sudarto, *Kapita Selekta Hukum Pidana*, 113-114.

²⁴ A. Widiada Gunakaya and Mas Putra Zenno J., *Politik Hukum Pidana 'Perspektif Pembaruan Hukum Pidana Dalam RKUHP'*, 62.

²⁵ Fadhel Ilahi, *Zina: Problematika dan Solusinya* (Jakarta: Qisthi Press, 2004), 7.

²⁶ Kartini Kartono, *Patologi Sosial* (Jakarta: RajaGrafindo Persada, 2003), 197.

²⁷ Kartini Kartono, 181.

²⁸ Oemar Seno Adji, *Hukum (Acara) Pidana Dalam Perspektif* (Jakarta: Erlangga, 1976), 48.

Even though the concept of adultery in the National Criminal Code has been expanded, the nature of the offense formulation is still an absolute complaint offense. The difference is that the National Criminal Code regulates the parties who can complain about it are also expanded. Thus, parents and/or children who feel aggrieved can also complain about it. The criminal sanctions for adultery in the National Criminal Code are the same as in the current Criminal Code, which places adultery as a light offense. The National Criminal Code provides criminal sanctions against perpetrators of adultery with a maximum imprisonment of one year or a category II fine, a maximum fine of ten million rupiahs.

The expansion of the concept of adultery aligns with the objective of criminal law reform to protect society because adultery has many negative impacts. It can cause unclean diseases that endanger society, like HIV/AIDS. Extramarital sexual intercourse is not in line with the values that exist in society so far because no religion in Indonesia allows adultery.

The law of a country must be in line with the society's socio-cultural values. Von Savigny says that law does not have to be made but grows and develops in society. Therefore, any country's law must be consistent with society's values. As a Dutch Colonial legacy, the current Indonesian Criminal Code is no longer relevant to the values of the Indonesian people. In the perspective of Western society that contains liberalism, individual freedom, including freedom in sexual relations, is upheld if there is no coercion. It is still taken for granted and is not reprehensible. This view is certainly not in accordance with Indonesian culture. Therefore, criminal law reforms are needed based on political and value approaches to be in accordance with the essence of criminal law reform.

In line with the argument, Sudarto emphasizes that criminal law must pay attention to the objectives of national development to realize a just and prosperous, equitable, material, and spiritual society based on Pancasila as the philosophical foundation of the state of Indonesia. Likewise, the criminalization of an act must place Pancasila as a fundamental imperative value.²⁹

The meaning and the essence of criminal justice reform can be determined based on the perspective of policy approaches. It includes social, criminal justice, and law enforcement policy approaches. In addition, it can also be based on the perspective of a value approach. The essence consists of efforts to review the socio-political, socio-philosophical, and socio-cultural values that underlie the normative and substantive contents of criminal law. Therefore, Article 284 of the Criminal Code is no longer relevant to the values that exist in society, including religious and moral values related to one another.

The concept of adultery, as extended in the provisions of Article 411 of the National Criminal Code, is also in line with the concept of adultery in neighboring

²⁹ Ali Rezky and Oheo Kaimuddin Haris, "Broadening of the Concept of Obscenity in the Draft of Indonesian Penal Code," *Hasanuddin Law Review* 4, no. 2 (2018): 233, <https://doi.org/10.20956/halrev.v4i2.1402>.

countries such as Malaysia and Brunei Darussalam. Section 2 point 1 of the Selangor Sharia Law Enactment No. 9 of 1995 defines adultery as intercourse between a man and a woman without marriage. The application of punishment for adultery is regulated in Section 25 of the Selangor Sharia Law Enforcement Committee Number 9 of 1995, namely fines, imprisonment, or *sebat* (lash). In Brunei Darussalam, adultery is regulated in the 2013 Sharia Criminal Canon of Brunei Darussalam. Article 68 of the canon states that a man and a woman are said to have committed adultery if they intentionally have intercourse without a legal marriage between them or a doubtful relationship. The sanctions for criminal acts are regulated in Article 69, paragraph (1) of the Canon of Criminal Code of Brunei Darussalam. There are two types of sanctions: (1) if the adultery is committed by a person who already has a legal partner (*mushan*) the penalty is to be stoned to death. If it is committed by a person who does not have a legal partner (*ghairu muhsan*), the penalty is one hundred lashes.³⁰ In communist countries like China, the Criminal Code does not explicitly contain a chapter on decency. Rape in the Chinese Criminal Code is punishable by crime as an act that violates a person's body, such as persecution.³¹ Liberal countries, like Turkey, do not include adultery in criminal acts. Adultery is just one of the reasons for divorce in family law.³²

C. Values Protected by the Expansion of the Concept of Adultery Crime in Article 411 of the Law Number 1 of 2023 on the Criminal Code

In terms of living their lives, the community agrees to maintain order and peace in their environment, this is in the form of a rule made in the form of various norms regarding actions that may not be carried out along with the settlement mechanism if the action is violated. The creation of the prohibited acts above is based on the awareness of many people, which of course are not in accordance with the basic morals that are adhered to and are also considered sacred by the community.³³ The context of efforts to make and to formulate a good Criminal Law, especially on the determination of criminalization policies, need several approaches. The approaches must still reflect the characteristics of criminal politics, namely rationalization.³⁴

Since rational criminal politics is oriented towards two things, the policy approach and the value approach, the criminal law politics is also an inseparable part of criminal politics. Therefore, the arrangement of criminalization and its

³⁰ Sudarti Sudarti, "Perbandingan Hukum Pidana Perzinaan di Malaysia dan Brunei Darussalam," *El-Mashlahah* 11, no. 1 (2021): 78–96, <https://doi.org/10.23971/elma.v11i1.2643>.

³¹ Andi Hamzah, *Delik-Delik Tertentu (Speciale Delicten) di Dalam KUHP*, 169.

³² Dian Andriasari, "Studi Komparatif Tentang Zina Dalam Hukum Indonesia dan Turki," *Jurnal Syi'ar Hukum* XIII, no. 3 (2011): 272, <https://doi.org/10.29313/sh.v13i3.664>.

³³ Umi Rozah and Erlyn Indarti, "Delik Zina: Unsur Subtansial dan Penyelesaiannya Dalam Masyarakat Adat Madura", *Jurnal Masalah Masalah Hukum* 48, no. 4 (2019): 367. <https://doi.org/10.14710/mmh.48.4.2019.366-375>

³⁴ A. Widiada Gunakaya and Mas Putra Zenno J., *Politik Hukum Pidana 'Perspektif Pembaruan Hukum Pidana Dalam RKUHP'*, 85.

penalization policies is a central issue in the politics of criminal code with penalization; and must also be oriented towards policies and values.³⁵ On the other hand, the policy approach relates to the values the criminal law needs to achieve or save. According to Bassiouni, the goals criminal law wants to achieve are principally manifested in social needs with specific values to be saved.³⁶

As a state of law, Indonesia must uphold three basic principles: (1) supremacy of law, (2) equality before the law, and (3) law enforcement that does not conflict with the rule of law. Article 29 paragraph (1) of the 1945 Constitution affirms that Indonesia is a country that is based on Belief in the One and Only God. Thus, the religious values must be used as a basis or guide in administering the state. One of which is in the administration of law. It can also be interpreted that all forms of laws and regulations must be in harmony with religious values.

To produce and to formulate a criminal code, lawmakers (legislators) must be able to look for values that grow and live in society. Bassiouni states that the values include: (1) maintaining order in society; (2) protecting citizens from crimes, losses, or harm that cannot be justified by others; and maintaining social justice.³⁷ It aims to provide justice for the people of Indonesia. The formulation of criminal rules that are religiously just (containing religious values and values in society) must still be synchronized with the provisions of the national legal system because there are still many values in society that originate or derive from divine values. It is expected that there will be no clashes or conflicts that prevent people from getting justice.

In principle, law embodies the social life of society, but law is also produced by the current social circumstances and conditions of society; and is based on the values that live in the society, including the changes. In this context, Kusumaatmadja argues that law as a social norm cannot be separated from the values prevailing in society. If there is a change in law, the law as a social norm will also change.³⁸

Every society always has a civilized moral system. It is related closely to moral issues. Thus, the meaning of moral values cannot be separated from people's assumptions about good and bad values. It can be seen from the disposition of decency crimes. For example, *bekekaruh* is a form of violating moral norms that do not allow adultery to be committed by married people. The act is considered immoral if it is witnessed by the local village community who claim that there has been a violation of the community's way of life. The perpetrator must receive sanctions or punishment to restore community harmony.

The rules of faith include rules in one aspect of human personal life. The purpose is only to control personal life by believing in supernatural powers, the

³⁵ A. Widiada Gunakaya and Mas Putra Zenno J.

³⁶ A. Widiada Gunakaya and Mas Putra Zenno J., 96.

³⁷ Ali Zaidan, *Menuju Pembaharuan Hukum Pidana* (Jakarta: Sinar Grafika, 2015), 303.

³⁸ Lysa Angrayni, *Pengantar Ilmu Hukum* (Pekanbaru: Suska Press, 2014), 78.

God Almighty.³⁹ In Indonesia, adultery is prohibited by any religion because it violates religious values.

The entry of Hinduism left a very important influence on the understanding of moral values. It is marked by the creation of customary law based on the beliefs of Hindus to achieve *moksartam yaca iti Dharma*. the Hindu Dharma religion intends to reach *moksa (moksartam)* and the welfare of life (*Yagahirta*).

According to Lontar Padma Bhumi Book, immoral acts are the private business of each person. However, it will become a matter for the wider community if a violation is a proper act and endangers *moksa* and *yagathirta*. Therefore, the perpetrator must be sanctioned or punished. It is executed as a form of personal responsibility of the perpetrator to society and the natural order. The Book of Sarasmuscaya also regulates the prohibition of immorality in Slokas 413, 422, and 423.

On the other hand, Islam affirms that it is very important to maintain morals. In the view of Islam, sexual intercourse between a married man or woman with partners that is not legal husband or wife is considered an act of adultery.⁴⁰ Islam even considers the same for unmarried individuals. The concept does not discriminate whether the perpetrator is a young man, a girl, a widow, or a widower. Therefore, in Islam, people who commit adultery, whether married or unmarried, must be punished. Islam considers adultery to be a disgraceful act that cannot be forgiven. The Holy Quran, Chapter Al-Isra verse 32, reads, "*and do not approach (the act of) adultery, in fact, adultery is an abomination, and it is a bad way*". Christianity also has similar moral values. The Bible explicitly states the prohibition of adultery. Adultery is a form of sexual immorality, according to the Book of Deuteronomy 22: 20-21.

The rise of decency cases in Indonesia provides a deep lesson about the value system that should be enforced in a society that upholds moral values. To realize religious justice, law enforcement against perpetrators of decency crimes, especially in the case of adultery, must be studied in depth. The law enforcement officials should not only adhere to the applicable rules but must also pay attention to the values or norms in society, such as religious norms that are guided by the holy book, and pay attention to Pancasila, especially the first precept, Belief in One Almighty God.

Religious rules are one of the social rules originating from God. They regulate prohibitions, orders, and recommendations. If the prohibition is violated and the order is not carried out, then people will receive sanctions from God in this world and hereafter. The purpose of religious rules is to discipline people, so they do not commit evil deeds. Mertokusumo states that religious rules aim to perfect humans. They prohibit humans from doing evil. However, religious rules have

³⁹ Purnadi Purbacaraka and Soerjono Soekanto, *Perihal Kaedah Hukum*, 12.

⁴⁰ Rahmawati, "Tindak Pidana Perzinaan Dalam Perspektif Perbandingan Antara Kitab Undang Undang Hukum Pidana Dan Hukum Pidana Islam," *Jurnal An Nisa'a* 8, no. 1 (2013): 16.

transcendental characteristics, and sanctions in religious rules are not formulated by society but have been determined by religious rules themselves.⁴¹

Similar to religious rules, legal and decency rules also prohibit humans from committing evil deeds, including adultery. Still, the rule of law makes the prohibition use legislative channels, namely, making the prohibition into written form (the law). If the person commits an act of adultery that has been prohibited by law, then law enforcement officials can impose criminal sanctions as stipulated by the law.⁴²

Based on the application's perspective in society, decency is closely related to values, norms, and law. Legal regulations on decency matters reflect the norms of decency in the society. The legal principle can be understood as a value system that can be used as a guideline for everyone to be accepted in their respective environment for exemplary purposes and benefits, inseparable from the fundamental values of the Indonesian people.

The values are very abstract. However, the values are very objective because they are supported by clear boundaries of just and civilized human values. There is no legal reason to eliminate values arising from culture. Even the direction of legal development must aim to preserve good cultural values by increasing the role of society.

The legislator's considerations are more focused on the values contained in society. However, many assumptions about value judgments that live in society. It is questionable because the views of community groups are very different when assessing something. This assumption is incorrect because the Indonesian people already have a standard of noble values, namely the values of Pancasila. The Indonesian people have several values. Ethnic groups have different cultures. The differences reflect the same principles and respect for the values of divinity, humanity, unity, democracy, and justice. Thus, there is no reason for society to reject Pancasila's values.

D. Conclusion

The determination of the primary policy to expand the offense of adultery in Article 411 of the National Criminal Code is based on a criminal policy perspective. The formulation of the offense of adultery as contained in the provisions of Article 284 of the Criminal Code is a problematic policy. It is because the formulation of the article only criminalizes the perpetrators who are married, not those who are not married. The adultery offense in Article 284 of the current Criminal Code is not based on the people's view of life. It does not reflect the social structure of Indonesian society, which is familial, group, and religious. Then, the values

⁴¹ Hwian Christianto, *Kejahatan Kesusilaan Penafsiran Ekstensif Dan Studi Kasus* (Yogyakarta: Suluh Media, 2017), 6.

⁴² Ishaq, "Kontribusi Jarimah Zina Dalam Pembaharuan Hukum Pidana Indonesia", *Jurnal Wacana Hukum Islam dan Kemanusiaan* 14, no. 1 (2014): 82, <https://doi.org/10.18326/ijtihad.v14i1.81-100>.

protected by the expansion of the concept are religious and moral values, which are closely related to values, norms, and laws, as well as Pancasila values.

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