

The Criminalization of Polyamory Perspective Islamic Penal Law and Indonesian New Penal Code

*Syabbul Bachri¹, Mohd Al Adib Samuri², Najma Moosa³, Büşra Nur Duran⁴, Ramadhita⁵

Universitas Islam Negeri Maulana Malik Ibrahim Malang, Indonesia^{1,5}

Universiti Kebangsaan Malaysia, Malaysia²

University of the Western Cape, South Africa³

Ondokuz Mayıs Üniversitesi, Turkey⁴

Corresponding Author: *sabbulb@uin-malang.ac.id

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Abstract

Regardless of the social stigma faced, polyamory has become a widely discussed issue and has received much attention in various fields. This study aims to examine the legal aspects regarding the criminalization of polyamory from the perspective of Islamic criminal law and the new penal code in Indonesia. This study is a type of normative juridical research with a conceptual and statutory approach. The research results show that any sexual relation outside of legal marriage is considered adultery in Islam, requiring criminal sanctions for the perpetrators. Polyamory cases involving same-sex couples are also included in the criminal act. In the Indonesian legal context, although the term polyamory is not mentioned explicitly, the new Penal Code has the potential to criminalize polyamorous perpetrators with the latest regulations regarding adultery and cohabitation offenses. This new penal code can also criminalize homosexual behaviour including lesbian, gay, bisexual, transgender, and Queer plus(LGBTQ+) people. However, the perpetrator of polyamory can only be convicted if there is a complaint from the aggrieved party (i.e. the legal spouse, children, and parents of the perpetrator), because those articles fall into the category of absolute complaint offenses. Looking at the cultural values of Indonesian

society, especially the teachings of Islam as a religion adhered to by the majority of citizens, the criminalization of polyamory should be included in the ordinary complaint offense so that it can be in line with the living norms in society.

Keywords: LGBTQ+; criminalization; polyamory; adultery;

Introduction

Polyamory is a type of relationship that is getting widely discussed and often appears in the public media and online forums. Furthermore, the discussion on polyamory has received lots of attention in various fields, including law, social policy, family sociology, gender, and sexuality studies ¹. Polyamory is defined as the practice of a consensual multi-partner relationship known as Consensual Non-Monogamy (CNM).² More specifically, polyamory is defined as the act of dating or having another partner even though that person has had a previous partner or is married and has children. While polygamy requires the existence of a valid marriage bond, polyamory does not require such

¹ Jessica Barnett, "Polyamory and Criminalization of Plural Conjugal Unions in Canada: Competing Narratives in the s.293 Reference," *Sexuality Research and Social Policy* 11 (1 Maret 2014), <https://doi.org/10.1007/s13178-013-0137-2>; Marian O'Connor, "Polyamory - a romantic solution to wanderlust?," *European Journal of Psychotherapy & Counselling* 21, no. 3–4 (2 Oktober 2019): 217–30, <https://doi.org/10.1080/13642537.2019.1652200>; Amy C. Moors, William Ryan, dan William J. Chopik, "Multiple Loves: The Effects of Attachment with Multiple Concurrent Romantic Partners on Relational Functioning," *Personality and Individual Differences* 147 (1 September 2019): 102–10, <https://doi.org/10.1016/j.paid.2019.04.023>; D. Hnatkovičová dan G. Bianchi, "Model of Motivations for Engaging in Polyamorous Relationships," *Sexologies* 31, no. 3 (1 September 2022): 184–94, <https://doi.org/10.1016/j.sexol.2022.03.003>; Ryan Scoats dan Christine Campbell, "What Do We Know about Consensual Non-Monogamy?," *Current Opinion in Psychology* 48 (Desember 2022): 101468, <https://doi.org/10.1016/j.copsyc.2022.101468>; Lorenzo Montali et al., "The Discursive Construction of Polyamory: Legitimising an Alternative to Monogamy," *Sexuality & Culture* 27, no. 3 (1 Juni 2023): 894–915, <https://doi.org/10.1007/s12119-022-10044-0>.

² Christian Klesse, "Polyamorous Parenting: Stigma, Social Regulation, and Queer Bonds of Resistance," *Sociological Research Online* 24, no. 4 (1 Desember 2019): 625–43, <https://doi.org/10.1177/1360780418806902>; Amy C. Moors et al., "Internalized Consensual Non-Monogamy Negativity and Relationship Quality Among People Engaged in Polyamory, Swinging, and Open Relationships," *Archives of Sexual Behavior* 50, no. 4 (Mei 2021): 1389–1400, <https://doi.org/10.1007/s10508-020-01885-7>; Iraklis Grigoropoulos, Konstantinos-Christos Daoulzidis, dan Panos Kordoutis, "Identifying Context-Related Socio-Cultural Predictors of Negative Attitudes Toward Polyamory," *Sexuality & Culture*, 13 Januari 2023, <https://doi.org/10.1007/s12119-023-10062-6>; Nicole Braidă, E. Matta, dan L. Paccagnella, "Loving in Consensual Non-Monogamies: Challenging the Validity of Sternberg's Triangular Love Scale," *Sexuality & Culture*, 16 Mei 2023, <https://doi.org/10.1007/s12119-023-10092-0>.

a bond. Polyamory prioritizes openness among partners both in matters of intimate (sexual) relationships and also in managing children³. Furthermore, regarding differences with monogamous relationships, partners involved in polyamorous relationships have an agreement with each other and allow each individual to have romantic or sexual relationships with other people⁴. Romance relationships with other people cannot also be said to be cheating due to the existence of consent or approval among polyamorous partners. This is the point of difference between polyamory and infidelity.⁵

One of the reasons for the great public attention to the issue of polyamory is the recognition by several world-famous celebrities such as Demi Moore, Tilda Swinton, Simone de Beauvoir, Pablo Picasso, and Will Smith who admit to having an agreement with their partners to have sexual relations with other people⁶. Followed later by Will Smith's daughter, Willow Smith, who also claims to have a polyamorous relationship.⁷ Polyamorous behaviour or CNM is becoming more common than people realize⁸. Janet Bennion research in Paris which involved 62 samples of polyamorous perpetrators.⁹ In addition, the results of a study in America that referred to a sample of single adults (N=3,438) showed that 16.8% wanted to engage in polyamorous behaviour, and 10.7% had carried out polyamorous activities at some time during their lives. About 1 in 15 people or 6.5% report that they know someone who has or is currently involved in polyamory. Among participants who were personally not interested in polyamory, there were 14.2% indicated that they respected people

³ Doris Scharmueller, "Doing Indefinite Time: Penal Confinement and the Life-Imprisoned Offender in Denmark, Finland, and Sweden," *The Prison Journal* 99, no. 1 (1 Januari 2019): 66–88, <https://doi.org/10.1177/0032885518814727>; William Jankowiak, "Is the Pair Bond a Human Universal? An Analytical Essay," *International Review of Psychiatry (Abingdon, England)* 35, no. 1 (Februari 2023): 16–24, <https://doi.org/10.1080/09540261.2023.2176743>; Katharine K. Baker, "The Polyamorous Threat to Nonmarriage," *Family Court Review* 61, no. 1 (2023): 81–101, <https://doi.org/10.1111/fcre.12684>.

⁴ Jacqueline N. Gunning et al., "A Preliminary Investigation into Intersections of Sexual Communication in Bondage, Domination, Sadomasochism and Disability," *Sexuality & Culture*, 7 Januari 2023, <https://doi.org/10.1007/s12119-022-10058-8>.

⁵ Amy C. Moors et al., "Attached to Monogamy? Avoidance Predicts Willingness to Engage (but Not Actual Engagement) in Consensual Non-Monogamy," *Journal of Social and Personal Relationships* 32, no. 2 (1 Maret 2015): 222–40, <https://doi.org/10.1177/0265407514529065>.

⁶ Moors et al.

⁷ "Willow Smith Opens up about Being Polyamorous," *BBC News*, 29 April 2021, bag. Newsbeat, <https://www.bbc.com/news/newsbeat-56852099>.

⁸ Scoats dan Campbell, "What Do We Know about Consensual Non-Monogamy?"

⁹ Janet Bennion, "Polyamory in Paris: A Social Network Theory Application," *Sexualities* 25, no. 3 (1 Maret 2022): 173–97, <https://doi.org/10.1177/1363460720975328>.

who were involved in polyamory¹⁰. Furthermore, the questionnaire data on a sample of 4160 Norwegians (18-89 years) showed that only 3% had polyamory or CNM. Meanwhile, those who had non-monogamous relationships without consent were 44.1%¹¹.

In Indonesia, polyamorous behaviour has not appeared on the public surface. Although it does not rule out the existence of such a relationship. The non-disclosure of polyamorous actors regarding their relationship in public may be due to the negative stigma that the world community has towards this behaviour¹², which even makes the perpetrators have to accept discrimination, harassment, and violence.¹³ Apart from this negative stigma, Indonesian laws only recognize polygamy but not polyamory. Even though Indonesia adheres to the principle of monogamy in marriage as emphasized in article 3 paragraph (1) of the Marriage Law, the law also provides an exception in terms of the possibility that if the husband wants to practice polygamy, the husband must obtain permission from the District Court (for non-Muslims) or from the Religious Court (for Muslims). This is in accordance with the provisions of Article 3 paragraph (2) of the Marriage Law and Article 56 paragraph (1) of The Compilation of Islamic Laws in Indonesia (KHI).¹⁴

¹⁰ Amy C. Moors, Amanda N. Gesselman, dan Justin R. Garcia, "Desire, Familiarity, and Engagement in Polyamory: Results From a National Sample of Single Adults in the United States," *Frontiers in Psychology* 12 (23 Maret 2021): 619640, <https://doi.org/10.3389/fpsyg.2021.619640>.

¹¹ Bente Træen dan Frode Thuen, "Non-consensual and Consensual Non-monogamy in Norway," *International Journal of Sexual Health* 34, no. 1 (2 Januari 2022): 65–80, <https://doi.org/10.1080/19317611.2021.1947931>.

¹² Beth Ellwood, "Despite the negative stigma, polyamorous relationships are more common than we think," 21 Mei 2021, <https://www.psypost.org/2021/05/despite-the-negative-stigma-polyamorous-relationships-are-more-common-than-we-think-60880>; Robert T Muller, "Polyamory: Sharing the Love Brings the Risk of Stigma," 3 Juni 2021, <https://www.psychologytoday.com/intl/blog/talking-about-trauma/202106/polyamory-sharing-the-love-brings-the-risk-stigma>.

¹³ Ryan Witherspoon, "Stigmatization of Polyamory: Perceptions, Predictors, and Clinical Implications," <https://doi.org/10.13140/RG.2.2.15901.61922>.

¹⁴ Meriyati Meriyati dan Mustamiruddin Mustamiruddin, "Praktek Poligami Tanpa Izin Pengadilan Agama Palembang," *De Jure: Jurnal Hukum dan Syar'iah* 11, no. 1 (30 Juni 2019): 36–47, <https://doi.org/10.18860/j-fsh.v11i1.6328>; Hervin Yoki Pradikta, Hasanuddin Muhammad, dan Musda Asmara, "Poligami di Malaysia dan Indonesia Serta Relevansinya dengan Pemenuhan Hak Gender," *Al-Istinbath: Jurnal Hukum Islam* 5, no. 2 November (30 November 2020): 213–28, <https://doi.org/10.29240/jhi.v5i2.1932>; Dahlia Haliah Ma'u, "The Harmonization of Polygamy Between Islamic Law and Legal Law in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 2 (9 Mei 2023): 669–86, <https://doi.org/10.22373/sjhk.v7i2.8519>; Lia Noviana, Risma Wigati, dan Nurulaini Halimatus Sakdiyah, "The Dynamics of Family Law Reform in Asia and Africa (Portrait of Polygamy Regulations in Indonesia, Malaysia, Pakistan, Morocco and

In Türkiye it is nearly the same. Neither polygamy nor polyamory is legal.¹⁵ Within Turkish Civil Law code, people can only marry with one spouse and man to woman¹⁶. Although decreasing from past to present, it is not a legal marriage men make their second or third marriages by Islamic marriage ritual¹⁷. It is an absolutely invalid marriage contract that does not create rights according to Turkish law. This relationship, which is defined as adultery in the eyes of law, is included in the law as one of the reasons for divorce.¹⁸ The Indonesian Government passed a new Penal Code on December 6, 2022, and officially enacted Law No. 1 of 2023 on the Criminal Code¹⁹ after 104 years of implementing the Dutch-inherited Penal Code. The ratification of the new Penal Code has raised concerns and responses from various parties, both nationally

Tunisia),” *Al-Syakhsyiyah: Journal of Law & Family Studies* 4, no. 2 (24 Februari 2023): 187, <https://doi.org/10.21154/syakhsyiyah.v4i2.5895>.

¹⁵ Ihsan Yilmaz, “Evolution of Unofficial Muslim Family Laws to Islamist Legal Pluralism in Erdogan’s Turkey,” dalam *The Sociology of Shari’a: Case Studies from Around the World*, ed. oleh Adam Possamai, James T. Richardson, dan Bryan S. Turner, Boundaries of Religious Freedom: Regulating Religion in Diverse Societies (Cham: Springer International Publishing, 2023), 99–116, https://doi.org/10.1007/978-3-031-27188-5_5; Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (Routledge, 2020).

¹⁶ Ihsan Yilmaz, “Towards an Islamist Hybrid Family Law,” dalam *Authoritarianism, Informal Law, and Legal Hybridity: The Islamisation of the State in Turkey*, ed. oleh Ihsan Yilmaz (Singapore: Springer, 2022), 67–112, https://doi.org/10.1007/978-981-19-0276-5_3; Başak Baysal dan Gizem Arslan, “The Making of the Turkish Civil Code,” dalam *The Making of the Civil Codes: A Twenty-First Century Perspective*, ed. oleh Michele Graziadei dan Lihong Zhang, Ius Gentium: Comparative Perspectives on Law and Justice (Singapore: Springer Nature, 2023), 51–63, https://doi.org/10.1007/978-981-19-4993-7_4.

¹⁷ Abdul Hakim, “Annulment of Marriage and Khuluk in Family Law in Muslim Countries: A Comparative Study of Family Law in Syria, Sudan, Turkey and Indonesia,” *Al-Hurriyah: Jurnal Hukum Islam* 7, no. 2 (31 Desember 2022): 192–203, <https://doi.org/10.30983/alhurriyah.v7i2.5561>; Razi Naseem, “Polygamy in Turkey, Malaysia and in Pakistan (a Comparative Analysis in the Light of Socio-Economic Conditions, Fiqh and Law)*,” *Hamdard Islamicus: quarterly journal of the Hamdard National Foundation, Pakistan XXXVIII* (27 November 2020): 39–64.

¹⁸ Mustafa Koray Uru dan Erdem Dirimeşe, “The Stigmatization of The Divorced Individuals,” *Universal Journal of History and Culture* 5, no. 1 (30 April 2023): 16–30, <https://doi.org/10.52613/ujhc.1172698>; Şengül Altan Arslan, Nurten Kara, dan Halil Ibrahim Duranay, “Women’s movements for the elimination of violence against women: lessons from oral history of the Law 4320 in Turkey,” *Policy Studies* 43, no. 4 (4 Juli 2022): 860–76, <https://doi.org/10.1080/01442872.2021.1977263>; Yilmaz, “Towards an Islamist Hybrid Family Law”; Tuba Erkoc Baydar, “A Secret Marriage and Denied Rights: A Critique from an Islamic Law Perspective,” *Religions* 14, no. 4 (April 2023): 463, <https://doi.org/10.3390/rel14040463>.

¹⁹ “UU No. 1 Tahun 2023,” Database Peraturan | JDIH BPK, diakses 10 Agustus 2023, <http://peraturan.bpk.go.id/Details/234935/uu-no-1-tahun-2023>.

and internationally²⁰. In the national scope, the leading legal practitioner in Indonesia, Hotman Paris, criticized the offense of adultery against unmarried people. The article on adultery was considered a blunder and illogical by him. Meanwhile, in the international realm, issues of sex outside of marriage and cohabitation have attracted international attention. The UN in this matter considers that "the revised Penal Code contravenes Indonesia's international legal obligations concerning human rights"²¹. Even though there are no specific provisions regarding polyamory in the new Penal Code, polyamorists should be worried because the articles on adultery and cohabitation can target them, as well as the provisions of the new Code, have the potential to criminalize lesbian, gay, bisexual, transgender, and queer plus (LGBTQ+) people²². However, in Turkiye although the LGBTQ+ organization has taken initiatives to achieve various rights, including marriage, under the leadership of non-governmental organizations, same-sex sexual relations and marriages are currently illegal²³.

In previous studies, apart from France and America as mentioned earlier, it appears that polyamory is a study that is carried out massively in various other countries such as the Netherlands²⁴, Norway²⁵, Spain²⁶

²⁰ M. Julnis Firmansyah, "Beragam Kekhawatiran Setelah UU KUHP Baru Disahkan," 11 Desember 2022, <https://fokus.tempo.co/read/1666960/beragam-kekhawatiran-setelah-uu-kuhp-baru-disahkan>.

²¹ Sebastian Strangio, "UN Says Indonesia's Revised Penal Code to Have Sweeping Rights Impacts," 12 Desember 2022, <https://thediplomat.com/2022/12/un-says-indonesias-revised-penal-code-to-have-sweeping-rights-impacts/>.

²² Willy Kurniawan, "Indonesia: New Criminal Code Disastrous for Rights Provisions Harmful to Women, Minorities, Free Speech," 2022, <https://www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights>.

²³ Ece Kocabiçak, "The Causes and the Consequences of the Patriarchal State: Evidence from Turkey," *Women's Studies International Forum* 98 (1 Mei 2023): 102744, <https://doi.org/10.1016/j.wsif.2023.102744>; Tuba Kanıcı et al., "The anti-gender movement in Turkey: an analysis of its reciprocal aspects," *Turkish Studies* 0, no. 0 (10 Januari 2023): 1–23, <https://doi.org/10.1080/14683849.2022.2164189>; Ayşe Güneş dan Çağlar Ezikoğlu, "Legal and Political Challenges of Gender Equality and Crimes Against Women in Turkey: The Question of Istanbul Convention," *Women & Criminal Justice* 33, no. 1 (2 Januari 2023): 14–27, <https://doi.org/10.1080/08974454.2022.2040695>.

²⁴ Rahil Roodsaz, "The 'hard work' of polyamory: ethnographic accounts of intimacy and difference in the Netherlands," *Journal of Gender Studies* 31, no. 7 (3 Oktober 2022): 874–87, <https://doi.org/10.1080/09589236.2022.2098094>.

²⁵ Ella Marie Sandbakken, Anita Skrautvol, dan Ole Jacob Madsen, "It's my definition of a relationship, even though it doesn't fit yours': living in polyamorous relationships in a mononormative culture," *Psychology & Sexuality* 13, no. 4 (2 Oktober 2022): 1054–67, <https://doi.org/10.1080/19419899.2021.1982755>.

(Rodríguez-Castro et al. 2022) and South Africa²⁷ in broad outline, the study of polyamory can be categorized into 3 main perspectives namely; sexology, psychology, and social acceptance and stigma²⁸. As a distinction from previous research, this study aims to examine the issue of the criminalization of polyamorous behaviour in terms of the perspective of Islamic criminal law and the new Penal Code in Indonesia which was passed on December 6, 2022, and was officially enacted with the enactment of Law No. 1 of 2023 on the Criminal Code, including if the polyamorist is married or single. The study of polyamory in this research also includes consensual non-monogamous relationships involving heterosexual, bisexual, and homosexual (gay or lesbian) partners.

This study is a normative juridical study with a conceptual and statutory approach²⁹, Data sources are obtained via secondary data collection and management, which is known as document analysis.³⁰ Indonesia's new Penal Code (Law No. 1 of 2023)was used as the primary legal material, followed by the previous Penal Code. Meanwhile, the secondary legal materials used derive from journal articles, research reports, news, books that examine polyamory, Islamic law concepts on adultery and homosexuality, and the formulation of changes in the new Penal Code related to the research subject. In order to obtain the research results, data related to polyamory was collected in a systematic way using the data analysis technique of Miles and Huberman which implemented three activities simultaneously; data reduction, data display, and

²⁶ Yolanda Rodríguez-Castro et al., “Analysis of the Experiences of Polyamorists in Spain,” *Sexuality & Culture* 26, no. 5 (1 Oktober 2022): 1659–83, <https://doi.org/10.1007/s12119-022-09964-8>.

²⁷ Stanley Molefi, Priscilla Gutura, dan Linda Eskell-Blokland, “Understanding Polyamory as a Form of Concurrency to Enhance HIV Programmes in South Africa: The Need to Re-Conceptualize the Partner Reduction Policy,” *The Journal of Practice Teaching and Learning* 19, no. 1–2 (20 April 2022), <https://doi.org/10.1921/jpts.v19i1-2.1675>.

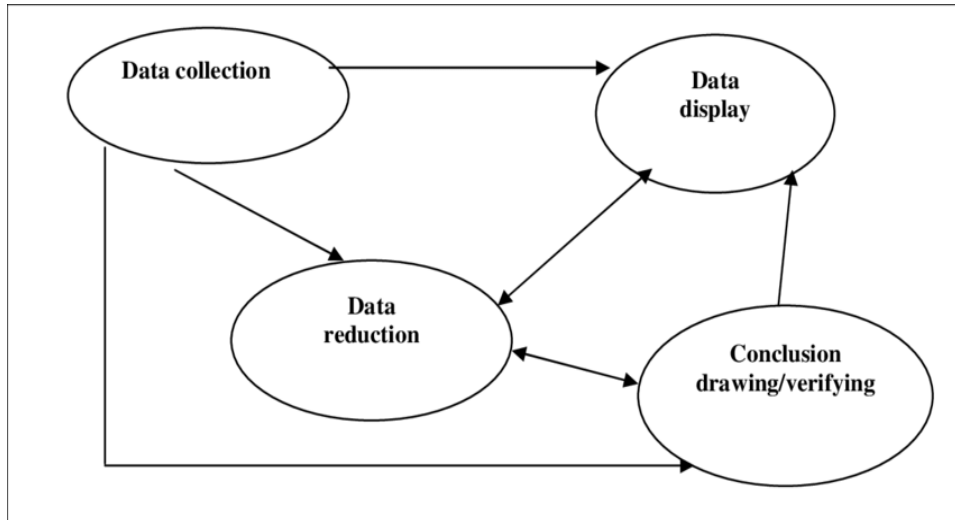
²⁸ Erkoc Baydar, “A Secret Marriage and Denied Rights”; Thomson J. Ling et al., “BDSM, Non-Monogamy, Consent, and Stigma Navigation: Narrative Experiences,” *Archives of Sexual Behavior* 51, no. 2 (1 Februari 2022): 1075–89, <https://doi.org/10.1007/s10508-021-02191-6>; Justin K. Mogilski et al., “Life History and Multi-Partner Mating: A Novel Explanation for Moral Stigma Against Consensual Non-monogamy,” *Frontiers in Psychology* 10 (2020), <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.03033>; Klesse, “Polyamorous Parenting,” 1 Desember 2019; Curtis Garner et al., “Satisfaction in Consensual Nonmonogamy,” *The Family Journal* 27, no. 2 (1 April 2019): 115–21, <https://doi.org/10.1177/1066480719833411>.

²⁹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media, 2005), 93–137; Soerjono Soekanto dan Sri Mamuji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)* (Jakarta: Rajawali Pers, 2001), 14.

³⁰ Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 2007), 12.

conclusions drawing/verification³¹. More details about the data analysis technique are illustrated in the following figure:

Figure 1. Data analysis technique of Miles & Huberman³²



Discussion

Polyamory and its Relationship Patterns

Polyamory means that a person has another romantic relationship or partner even though the person is married and has children. Polyamory does not require marriage as a bond. Polyamory only emphasizes the nature of being open to each other. This openness is not only related to intimate relationships but also to parenting³³. The term polyamory appeared in America in the 1990s. It refers to the possibility of having several intimate, affective, or sexual relationships with more than one person simultaneously with the consent of everyone involved³⁴. In conjunction with the rise of feminism and the belief that heterosexuality is a normal sexual orientation for humans (heteronormativity), polyamory has become a discussion study that raises questions about monogamous relationships, which are considered to be forms of male

³¹ Matthew B. Miles dan A. M. Huberman, *Qualitative Data Analysis: An Expanded Sourcebook*, 2nd ed (Thousand Oaks: Sage Publications, 1994), 10, <http://catdir.loc.gov/catdir/enhancements/fy0655/93041204-t.html>.

³² Miles dan Huberman, 12.

³³ Irianti Bandu dan Prasuri Kuswarini, "Perilaku Poliamori Dalam 'Detruire Dit-Elle Karya Marguerite Duras,'" 23 Agustus 2017, <https://journal.unhas.ac.id/index.php/jib/article/view/2357>.

³⁴ Maria Silva e Silvério, "Eu, tu... ilus: poliamor e não-monogamias consensuais," 19 Desember 2018, <https://repositorio.iscte-iul.pt/handle/10071/18470>.

dominance over women³⁵. Polyamory is a form of non-monogamy that not only recognizes the diversity of sexual partnerships but includes the possibility of loving more than one person and maintaining more than one relationship at the same time.³⁶

There are four (4) models of polyamory that are most commonly practiced, namely: a) Polyfidelity. That is a polyamorous relationship formed in a closed group where the members have an agreement not to have romantic or sexual relations outside the group; b) Triads or throuples. This relationship involves three people with each other in a romantic or sexual relationship; c) Quads. Relationships involving four (4) people where it is possible for them to have sexual relations with each other; d) Vee. In this relationship, a person is dating two (2) different people, but the two people he is dating are not romantically related to each other³⁷.

The various types of polyamorous relationships above can be categorized into two patterns of relationships: hierarchical and non-hierarchical. The hierarchical relationship model is defined as a relationship between two people who agree that the relationship between them is primary (more important) and the relationship with other people is secondary³⁸. Individuals in primary relationships tend to live together for a long time, are married, share in financial and household affairs, and raise children they have together. Meanwhile, partners in secondary relationships generally have a relationship commitment that is less sustainable and has a short relationship duration³⁹. Furthermore, the non-hierarchical relationship structure is a polyamorous relationship where all partners are considered as the main partners or considered equal to one another. All partners carry out the agreed boundaries of commitments and obligations equally. The typical individual in this relationship model is interested in many love or sexual relationships, but their greatest commitment is not to those relationships but to something else such as work, raising children, and so on⁴⁰.

³⁵ Hnatkovičová dan Bianchi, "Model of Motivations for Engaging in Polyamorous Relationships"; Hnatkovičová dan Bianchi.

³⁶ Antonio Cerdeira Pilão, "Conjugalities and Sexualities in Conflict: Monogamy and Polyamory among LGBT Groups," *Vibrant: Virtual Brazilian Anthropology* 18 (15 Oktober 2021), <https://doi.org/10.1590/1809-43412021v18a503>.

³⁷ Sian Feguson, "Throuple, Quad, and Vee: All About Polyamorous Relationships," 2021, <https://psychcentral.com/health/polyamorous-relationship>.

³⁸ Hnatkovičová dan Bianchi, "Model of Motivations for Engaging in Polyamorous Relationships."

³⁹ Moors et al., "Internalized Consensual Non-Monogamy Negativity and Relationship Quality Among People Engaged in Polyamory, Swinging, and Open Relationships."

⁴⁰ Kathy Labriola, "Models of Open Relationships," *Journal of Lesbian Studies* 3, no. 1–2 (1 Januari 1999): 217–25, https://doi.org/10.1300/J155v03n01_25.

Stigma and Defense of Polyamory

Polyamorous relationships are often regarded as an immoral deviation from the ideal of monogamy by society, are disapproved of, and become the target of negative attitudes and prejudice⁴¹. There is evidence that polyamory and other Consensual Non-Monogamy (CNM) relationships are socially stigmatized, considered less desirable, and even considered dangerous to humans and society⁴². The stigma impacts other contexts to varying degrees. In the context of health, for example, polyamory is considered a trigger for contracting sexually transmitted infections even though this statement is not supported by research studies. The stigma also extends to mental health professionals who are shown to often have the desire to persuade their clients not to engage in polyamorous relationships and the like.⁴³

Social stigmatization of polyamory and CNM, furthermore, is also manifested in various forms of discrimination which result in weak participation in several social, legal, economic, and institutional rights⁴⁴. The social and legal vulnerabilities of families experiencing polyamory, as mentioned by Emens (2004) are caused by provisions from legislators and also a commitment to the value of monogamy in various areas of law, such as clarity of legal ties between spouses through civil marriage and the criminalization or discrimination of polyamory/CNM through adultery and bigamy laws⁴⁵.

Apart from the stigma against polyamory, there are defences for this relationship model, assuming that monogamous relationships are vulnerable to infidelity, betrayal, divorce, and economic and emotional pressure. Meanwhile, polyamory is considered a relationship model that can help avoid dissatisfaction, pressure in marriage, and the trauma of divorce. Furthermore, a couple and psychosexual therapist, Marian O'Connor, said in her research that there are

⁴¹ David Rodrigues et al., "Which Partners Are More Human? Monogamy Matters More than Sexual Orientation for Dehumanization in Three European Countries," *Sexuality Research and Social Policy* 15, no. 4 (1 Desember 2018): 504–15, <https://doi.org/10.1007/s13178-017-0290-0>.

⁴² Léa J Séguin, "The Good, the Bad, and the Ugly: Lay Attitudes and Perceptions of Polyamory," *Sexualities* 22, no. 4 (1 Juni 2019): 669–90, <https://doi.org/10.1177/1363460717713382>.

⁴³ Daniel Cardoso, Patricia M. Pascoal, dan Francisco Hertel Maiochi, "Defining Polyamory: A Thematic Analysis of Lay People's Definitions," *Archives of Sexual Behavior* 50, no. 4 (1 Mei 2021): 1239–52, <https://doi.org/10.1007/s10508-021-02002-y>; Cardoso, Pascoal, dan Maiochi; Cardoso, Pascoal, dan Maiochi.

⁴⁴ Christian Klesse, "Polyamorous Parenting: Stigma, Social Regulation, and Queer Bonds of Resistance," *Sociological Research Online* 24, no. 4 (1 Desember 2019): 11, <https://doi.org/10.1177/1360780418806902>.

⁴⁵ Klesse, "Polyamorous Parenting," 1 Desember 2019.

several rules applied between polyamorous partners that would also be better if monogamous couples do so. These rules are about openness, honesty, discussing preferences, timetabling sex, and exerting effort and commitment to ensuring quality time together ⁴⁶.

Criminalization of Polyamory from the perspective of Islamic Criminal Law

Islam recognizes polygamy that is limited to polygyny and does not recognize polyamory. Islamic polygamy emphasizes the existence of legal marriage bonds of a relationship between a man and several women, with a maximum number of four (4) women, carried out with conditions of physical ability and fair treatment of wives ⁴⁷. Meanwhile, polyamory requires agreement with each other and allows each individual in the pair to have romantic or sexual relationships with other people without considering marital ties. Polyamory has a broader scope than Islamic polygamy because polyamorous relationships do not only include relationships between men and several women but also relationships between women and several men. More than that, the relationship can also involve gay, bisexual, lesbian, and heterosexual partners ⁴⁸.

An agreement between married couples to be able to have sexual relations with other people cannot be justified in Islamic teachings. Married men may not have romantic relationships with other women without going through a religiously valid marriage. Meanwhile, married women are prohibited from having sexual relations except with their husbands. The woman can only relate to other men through legal marriage bonds on the condition that there has been a divorce from her first husband and has passed the waiting period (*iddah*) ⁴⁹. Sexual relationship outside of legal marriage is considered adultery which requires criminal sanctions on the perpetrators ⁵⁰. According to Islamic law,

⁴⁶ Marian O'Connor, "Polyamory - a romantic solution to wanderlust?," *European Journal of Psychotherapy & Counselling* 21, no. 3-4 (2 Oktober 2019): 5, <https://doi.org/10.1080/13642537.2019.1652200>.

⁴⁷ Man Baker, "Polygyny in Islam: a call for retrospection," *British Journal of Middle Eastern Studies* 0, no. 0 (2 September 2021): 1-13, <https://doi.org/10.1080/13530194.2021.1975258>.

⁴⁸ Indigo Stray Conger, "Polyamory: What It Is, Types, & How It Works," *Choosing Therapy*, 2022, <https://www.choosingtherapy.com/polyamory/>.

⁴⁹ Ahmad Rezy Meidina, "Legal System of Polygamy and Divorce in Muslim Countries: Comparative Studies among Turkey, Pakistan, and Indonesia," *Matan : Journal of Islam and Muslim Society* 5, no. 1 (24 Mei 2023): 15-30, <https://doi.org/10.20884/1.matan.2023.5.1.8301>.

⁵⁰ Supardin Supardin dan Abdul Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law: Alternatives in Indonesia's Positive Legal System Reform," *Samarab: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (26 Desember 2021): 913-27, <https://doi.org/10.22373/sjkh.v5i2.9353>.

those who are not married are punished 100 times with lashings if they commit adultery⁵¹. In accordance with the provisions of the Quran (24:2) as follows:

الرَّانِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ
وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ

As for female and male fornicators, give each of them one hundred lashes, and do not let pity for them make you lenient in 'enforcing' the law of Allah, if you 'truly' believe in Allah and the Last Day. And let several believers witness their punishment"

Meanwhile, the perpetrators of adultery who are still in the marital bond will be punished by stoning based on the hadith of the Prophet which reads:

حَدَّثَنَا بَكْرُ بْنُ خَلْفٍ أَبُو بَشِيرٍ قَالَ: حَدَّثَنَا يَحْيَى بْنُ سَعِيدٍ، عَنْ سَعِيدِ بْنِ أَبِي عَرُوبَةَ، عَنْ قَتَادَةَ، عَنْ يُونُسَ بْنِ جُبَيْرٍ، عَنْ حِطَّانَ بْنِ عَبْدِ اللَّهِ، عَنْ عُبَادَةَ بْنِ الصَّامِتِ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: خُذُوا عَنِّي، خُذُوا عَنِّي، قَدْ جَعَلَ اللَّهُ لِهِنَّ سَبِيلًا. الْبِكْرُ بِالْبِكْرِ جُلْدٌ مِائَةً وَتَغْرِيْبٌ سَنَةً، وَالنَّيْبُ بِالنَّيْبِ جُلْدٌ مِائَةً وَالرَّحْمُ

"It was narrated from 'Ubadah bin Samit that the Messenger of Allah (ﷺ) said: "Learn from me. Allah (SWT) has ordained for them (women) another way. (If) a virgin (commits illegal sexual intercourse) with a virgin, (the punishment is) one hundred lashes and exile for one year. (If) a Thayyib (commits adultery) with a Thayyib (the punishment is) one hundred lashes and stoning."

Islamic law also regulate the law of polyamory when it involves couples of the same gender (gay and lesbian). In Islam, homosexual cases involving same-sex men are called liwath, which involves inserting the penis of one man into the rectum of another.⁵³ Even if it is a woman with whom anal intercourse is established, it is expressed with the same term. Meanwhile, Islamic jurisprudence refers to acts of homosexuality involving fellow women as al-

⁵¹ Abdel Salam Sidahmed, "Problems in Contemporary Applications of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women," *British Journal of Middle Eastern Studies* 28, no. 2 (1 November 2001): 187–204, <https://doi.org/10.1080/13530190120083077>; Supardin dan Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law"; Farah Edhar Khaerunisa, "Adultery In The Perspective of Islamic Religious Law And Positive Law In The Indonesian Community," *HUNAFSA: Jurnal Studia Islamika* 18, no. 2 (31 Desember 2021): 158–74, <https://doi.org/10.24239/jsi.v18i2.614.158-174>; Muhammad Mutawali, "Customary Law of Dou Donggo Bima from the Perspective of Islamic and Indonesian Positive Law," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 17, no. 1 (29 Juni 2022): 1–27, <https://doi.org/10.19105/al-lhkam.v17i1.6007>.

⁵² Abi Abdullah Muhammad ibn Yazid Ibn Majah al Qazwini, *Sunan Ibn Majah* (Jordan: Baitul Afkar al Dauliah, t.t.), 277.

⁵³ Muḥammad Rawwās Qal'ah'jī, *Mu'jam lughat al-fuqahā'*, 'Arabi - Inkilīzī: ma'a kashshāf Inkilīzī-'Arabi bi-al-muṣṭalahāt al-wāridah fī al-mu'jam (Dār al-Nafā'is, 1988), 394.

sihaq⁵⁴. Homosexual acts, in Islam, are prohibited and even criminal acts⁵⁵ The prohibition of homosexual behaviour is based on the Quran (7:80-81) as follows:

وَلَوْطًا إِذْ قَالَ لِقَوْمِهِ أَتَأْتُونَ الْفَاحِشَةَ مَا سَبَقَكُمْ بِهَا مِنْ أَحَدٍ مِنَ الْعَالَمِينَ (80) إِنَّكُمْ لَتَأْتُونَ
الرِّجَالَ شَهْوَةً مِنْ دُونِ النِّسَاءِ بَلْ أَنْتُمْ قَوْمٌ مُّسْرِفُونَ (81)

“And ‘remember’ when Lot scolded ‘the men of’ his people, ‘saying,’
“Do you commit a shameful deed that no man has ever done before?
You lust after men instead of women! You are certainly transgressors.”

According to Islamic jurisprudence, even though the verse explicitly (‘Ibārat al-Nash) explains the prohibition of homosexual act among men, it also references an implicit prohibition (Dilālat al-Nash) of lesbian relationship⁵⁶ The affirmation of the prohibition of homosexuality (gay or lesbian) was also confirmed by the Prophet Muhammad in the following hadith:

وَرَوَى مُحَمَّدُ بْنُ عَبْدِ الرَّحْمَنِ، عَنْ خَالِدِ الْحَدَّاءِ، عَنْ ابْنِ سِيرِينَ، عَنْ أَبِي مُوسَى، قَالَ: قَالَ
رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: إِذَا أَتَى الرَّجُلُ الرَّجُلَ فَهُمَا زَانِيَانِ، وَإِذَا أَتَتِ الْمَرْأَةُ الْمَرْأَةَ
فَهُمَا زَانِيَتَانِ⁵⁷

"If a man approaches another man, they are both adulterers. And if a woman approaches another woman, they are both adulterers."

According to the hadith above, homosexual behaviour is comparable to adultery. On this basis, some scholars determine the criminal punishment for homosexuality according to the texts (The Quran and hadith) on adultery⁵⁸. If the perpetrator is muḥṣān (married), then he will be sentenced to death (stoning). While those who are gḥayr muḥṣān (unmarried) will be punished with flogging. These rules are lined by Allah and nobody can increase or decrease the

⁵⁴ Deswita Keumala Ulfah, Mohd Din, dan Ali Abubakar, “Criminal Sanction Approach to Liwath (Gay) and Musahaqah (Lesbian) Behavior in Qanun Jinayah Number 6 of 2014,” *Syah Kuala Law Journal* 5, no. 1 (30 April 2021): 13–25, <https://doi.org/10.24815/sklj.v5i1.19871>.

⁵⁵ Fatmawati Fatmawati, “Homoseks Dan Lesbian Perspektif Hukum Islam,” *DIKTUM: Jurnal Syariah Dan Hukum* 13, no. 2 (23 Juli 2015): 143, <https://doi.org/10.35905/diktum.v13i2.367>.

⁵⁶ Fatmawati, 143.

⁵⁷ Ahmad ibn Husain Abu Bakar al Baihaqi, *Al Sunan Al Kubra*, vol. 8 (Beirut: Dar al Kitab al Alamiyah, 2003), 406.

⁵⁸ Sabine Schmidtke, “Homoeroticism and Homosexuality in Islam: A Review Article,” *Bulletin of the School of Oriental and African Studies, University of London* 62, no. 2 (1999): 260–66; Augustine Edobor Arimoro, “Interrogating the Criminalisation of Same-Sex Sexual Activity: A Study of Commonwealth Africa,” *Liverpool Law Review* 42, no. 3 (1 Oktober 2021): 379–99, <https://doi.org/10.1007/s10991-021-09280-5>; Aisyah Aymance M. Zaharin, “Reconsidering Homosexual Unification in Islam: A Revisionist Analysis of Post-Colonialism, Constructivism and Essentialism,” *Religions* 13, no. 8 (Agustus 2022): 702, <https://doi.org/10.3390/rel13080702>.

penalty of this crime ⁵⁹. This opinion was shared by Sa'id bin Musayyab, al-Hasan al-Bashry, Ibrahim al-Nakha'iy, Atha' bin Abi Rabah, Qatadah, al-Tsaury, and al-Shafi'i. In another narration, al-Shafi'i argues that homosexuality is given the death penalty as the Prophet's Companions also sentence the death penalty to the single or married perpetrator. This view is also the opinion of Malik bin Anas, Ahmad ibn Hanbal, al-Zuhry, and Ishaq, as they determine the stoning punishment for homosexuals ⁶⁰. The reason for determining the death penalty for homosexual offenders, either single or married (muḥṣān), is based on the hadith of the Prophet Muhammad:

حَدَّثَنَا مُحَمَّدُ بْنُ عَمْرٍو السَّوَّاقُ حَدَّثَنَا عَبْدُ الْعَزِيزِ بْنُ مُحَمَّدٍ عَنْ عَمْرٍو بْنِ أَبِي عَمْرٍو عَنْ
عُكْرَمَةَ عَنْ ابْنِ عَبَّاسٍ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مَنْ وَجَدْتُمُوهُ يَعْمَلُ عَمَلَ قَوْمِ
لُوطٍ فَأَقْتُلُوا الْفَاعِلَ وَالْمَفْعُولَ بِهِ

"Whoever you find committing the acts of the people of Lot, kill both the doer and the receiver."⁶¹

The hadith above shows that homosexuals can be penalized with the death penalty. In addition to punishment by stoning, as explained earlier, some other ways of the death penalty are applied to homosexual offenders. Abu Bakr and Khalid bin Walid punished homosexual actors by burning them. Ali bin Abi Talib gave the punishment by being killed with a sword after being burned. 'Umar bin Khattab and 'Uthman bin Affan penalized homosexual offenders by suppressing them with a wall. Meanwhile, Ibn Abbas argues that homosexuals are punished by being thrown from the top of a tall building.⁶² According to Abu Hanifa and Zahiris, liwath is a crime that requires tazir, due to the lack of

⁵⁹ Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (Oxford University Press, 2019).

⁶⁰ Muhammad Taufan Djafri, Darussalam Syamsuddin, dan Abdul Syatar, "Maslahat Dalam Hukuman Mati Bagi Pelaku Lgbt," *Bilancia: Jurnal Studi Ilmu Syariah Dan Hukum* 16, no. 2 (18 Desember 2022): 225–48, <https://doi.org/10.24239/blc.v16i2.1154>; Syarifudin Syarifudin, "Application of the Legal Maxim of Al-Ashl Fi Al-Ibdha 'al-Tahrim to the Phenomena of Homosexuality," *Al-Manabij: Jurnal Kajian Hukum Islam* 16, no. 1 (30 Mei 2022): 45–58, <https://doi.org/10.24090/mnh.v16i1.6424>; Sharmila Devi, "International Outrage over Brunei's Discriminatory Laws," *The Lancet* 393, no. 10180 (13 April 2019): 1489, [https://doi.org/10.1016/S0140-6736\(19\)30847-5](https://doi.org/10.1016/S0140-6736(19)30847-5); Anan Bahrul Khoir, "LGBT, Muslim, and Heterosexism: The Experiences of Muslim Gay in Indonesia," *Wawasan: Jurnal Ilmiah Agama Dan Sosial Budaya* 5, no. 1 (30 Juni 2020): 1–19, <https://doi.org/10.15575/jw.v5i1.8067>; Helen Pausacker, "Homosexuality and the law in Indonesia," dalam *Crime and Punishment in Indonesia* (Routledge, 2020).

⁶¹ Muhammad ibn Isa ibn Tsaurah At-Tirmidzi, *Jami' At Tirmidzi* (Jordan: Baitul Afkar al Dauliah, t.t.), 1453.

⁶² Muhammad bin 'Aly al-Syawkanī, *Nayl al-Awṭār*, Juz 7 (Egypt: Dār al-Hadīth, 1993), 139–40.

the legal element that solicitation necessitates the provision of adultery. As seen the liwath is a crime in all circumstances and must be punished according to Islam.⁶³

Islamic teachings place a heavy emphasis on sexual morality and chastity in the context of marriage. Adultery is rigorously prohibited and is punishable by severe legal penalties. From an Islamic perspective, polyamory can be seen as a violation of the sanctity of marriage and the religion's moral standards. Additionally, LGBTQ+ relationships within the context of polyamory are discussed. This prohibition includes same-sex polyamorous relationships. The stance against homosexual acts derives from religious interpretations and carries significant weight within Islamic doctrine. Adultery, which is deemed a sinful or unlawful conduct, is subject to specific punishments under Islamic criminal law. Adultery, which is defined as sexual relations outside of valid marriage alliances, may result in harsh punishments, such as stoning or flogging. Polyamory involving sexual relations outside of marriage could potentially fall under the category of adultery and be subject to such penalties. In addition, based on the above provisions, polyamory is included in ordinary offences in Islamic Criminal Law so that it can be punished even without a complaint.

The Criminalization of Polyamory in the New Penal Code in Indonesia

As polyamory involves several models of relationships, reviewing the criminal aspect of polyamory is classified into three (3) categories, namely; polyamorous relationships involving partners without marriage relations; Polyamory involving some partners bound by marriage relations; and polyamorous relationships involving same-sex (homosexual) couples.

Criminal review of polyamorous behaviour where the perpetrator are not bound by a marital relationship

Before explaining the analysis of the criminalization of polyamorous behaviour from the perspective of the new Penal Code in Indonesia which was passed on December 6, 2022, and was officially enacted with the enactment of Law No. 1 of 2023 on the Criminal Code, this subtopic will explain the criminalization analysis related to the topic in the old Penal Code of Indonesia

⁶³ H. Suwardin, "LESBIAN, GAY, BISEKSUAL, TRANSGENDER (LGBT) PERSPEKTIF IMAM SYAFI, HUKUM ISLAM DAN HUKUM POSITIF," *Nuansa: Jurnal Studi Islam dan Masyarakat* 11, no. 2 (1 Desember 2018), <https://doi.org/10.29300/nuansa.v11i2.1364>; Khairani Khairani, "Law Enforcement Against Lesbian, Gay, Bisexual, and Transgender (LGBT) Phenomena in The Qanun Jinayah in Aceh," *Al-'Adalah* 16, no. 1 (30 Juli 2019): 155–76, <https://doi.org/10.24042/adalah.v16i1.3912>; Siti Sahara dan Meta Suriyani, "Sosialisasi Qanun Hukum Jinayat Dalam Mencegah Terjadinya Kriminalitas Liwath Di Aceh," *Global Science Society: Jurnal Ilmiah Pengabdian Kepada Masyarakat* 1, no. 1 (20 Maret 2019): 62–78.

before the legal reform. This is because the new Penal Code (Law No. 1 of 2023 on the Criminal Code) will only come into effect three (3) years after it is enacted which is in 2026. In this way, it can still be changed again or reverted to the old law at any time. As a result of the Government's three-year transition period from the old Penal Code to the new one, those who disagreed were able to submit a judicial review under Indonesia's legal procedure⁶⁴.

Polyamorous Behaviour of The Actors That Are Not Bound By Marital Relations

In The Old Penal Code Of Indonesia. In the provisions of the old Penal Code in Indonesia, Polyamorous behaviour was regulated in article 284 that “(1) A maximum imprisonment of nine months shall be punished: 1.a. a married man who commits adultery (overspel), even though it is known that Article 27 BW applies to him, b. a married woman who commits adultery, even though it is known that Article 27 BW applies to her; 2. a. a man who participates in the act, even though he knows that the guilty party is already married; b. a married woman who participates in the act, even though she knows that the guilty party is already married and Article 27 BW applies to her. (2) Prosecution is not carried out except on complaints from the tainted husband/wife, and if Article 27 BW applies to them, within a period of three months it is followed by a request for divorce or for separate tables and beds for that reason. (3) Articles 72, 73 and 75 do not apply to this complaint. (4) Complaints can be withdrawn as long as the examination in court has not yet started. (5) Article 27 BW applies to husband and wife, complaints are not heeded as long as the marriage has not been decided due to divorce or before the decision declaring table and bed separation to be permanent”⁶⁵.

According to the provisions above, adultery occurs when a married person has sexual relations with another without a legal marriage bond. As well as an act of adultery, legal action can only be taken if there is a complaint from

⁶⁴ Nurul Adriyana Salbiah, “KUHP Baru Berlaku Efektif 3 Tahun Setelah Resmi Diundangkan - Jawa Pos,” 6 Desember 2022, <https://www.jawapos.com/nasional/01423116/kuhp-baru-berlaku-efektif-3-tahun-setelah-resmi-diundangkan>.

⁶⁵ Any Ismayawati, “Konsistensi Pasal 284 KUHP Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,” *Legality: Jurnal Ilmiah Hukum* 24, no. 1 (2016): 87–100; Anis Widyawati, “Criminal Policy of Adultery in Indonesia | Journal of Indonesian Legal Studies,” *Journal of Indonesian Legal Studies* 5, no. 1 (2020), <https://doi.org/10.15294/jils.v5i1.36786>; Tody Sasmitha Jiwa Utama, “Between adat law and living law: an illusion of customary law incorporation into Indonesia penal system,” *The Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (4 Mei 2021): 269–89, <https://doi.org/10.1080/07329113.2021.1945222>; Mutawali, “Customary Law of Dou Donggo Bima from the Perspective of Islamic and Indonesian Positive Law.”

the husband/wife from one of the perpetrators of adultery⁶⁶. Thus, sexual intercourse carried out by unmarried couples cannot be criminally charged. Of course, the act must be based on voluntary. If it is based on coercion or threats, it can be penalized with the offense of rape, which is punishable by 12 years in prison per the provisions of article 285 of the old Penal Code. In addition, sexual intercourse with a woman who is unconscious or helpless will be charged with imprisonment for 9 years per Article 286 of the old Penal Code. Thus, polyamorous relationships involving heterosexual couples outside of marriage cannot be criminalized according to the provisions in force in the old Penal Code because they did not meet the elements of the offense of adultery and were committed voluntarily. Opportunities for criminalizing polyamory outside of marital ties can occur if it turns out that one of the participants involved is underage (under 15 years old). Because in that situation, perpetrators who have sexual relations with underage participants will be charged with a sentence of 9 years in prison per article 287 of the old Penal Code.

In other circumstances, polyamorous relationships can also occur in terms of prostitution with the involvement of a partner who is a sex worker. In that case, the criminal law regulations in Indonesia regarding prostitution in articles 296 and 506 of the old Penal Code can only criminalize pimps and owners of brothels. More details regarding articles 296 and 506 are as follows:

Article 296: "Anyone whose livelihood or habit is to intentionally carry out or facilitate obscene acts with other people is punished with imprisonment for a maximum of one year and four months or a fine of up to Rp. 15.000,".

Article 506: "Whoever as a pimp (sounteneur) profits from the prostitution of women, is punished with imprisonment for a maximum of three months"

Based on the above rules, pimps can be punished with a threat of 3 months and brothel providers will be threatened with a sentence of 1 year and 4 months in prison. Meanwhile, users of prostitution services and sex workers cannot be penalized. The practice of prostitution is part of the act of adultery, categorized as a crime without a victim. The old Criminal Code determined that sex workers and users of prostitution services were classified as witness victims and not as perpetrators in their actions so it is obvious that the Indonesian old Penal Code does not provide legal certainty for them. Sex workers, who prostitute themselves with or without a pimp, and users of prostitution services are not criminal acts because they are not prohibited in the old Penal Code even though it violates religious norms, customs, and decency in the society.⁶⁷

⁶⁶ Widyawati, "Criminal Policy of Adultery in Indonesia | Journal of Indonesian Legal Studies."

⁶⁷ Ida Bagus Gumilang Galih Sakti dan I. Made Arjaya, "Regulation of The Imposition of Criminal Sanctions against The Criminal Acts of Prostitution in Indonesian Positive Law,"

Polyamorous Act that is not bound by marital relations in the New Penal Code in Indonesia After the ratification on 6 December 2022.

If in the former Penal Code, voluntary extra-marital intercourse between a man and a woman out of a marriage cannot be categorized as adultery or overspel, in the new Penal Code such a relationship can be criminalized because it is included in the category of adultery offense. Article 411 of the new Penal Code states: "1) Every person who has intercourse with someone who is not his husband or wife is convicted of adultery, with a maximum imprisonment of 1 (one) year or a maximum fine of category II; 2) Against the Crime as referred to in paragraph (1) no prosecution is carried out except on complaints: - husband or wife for people who are bound by marriage; - Parents or children for people who are not bound by marriage; 3). The provisions as referred to in paragraph (2) do not apply to complaints as referred to in Article 25, Article 26, and Article 30; 4). Complaints can be withdrawn as long as the examination before the trial court has not started"⁶⁸.

Furthermore, related to cohabitation issues, Article 412 of the new Penal Code states: "1). Everyone who lives together as husband and wife outside of marriage shall be punished with imprisonment for a maximum of 6 (six) months or a maximum fine of category II; 2). Against the Crime as referred to in paragraph (1) no prosecution is carried out except on complaints: - Husband or wife for people who are bound by marriage; or - Parents or children for people who are not bound by marriage; 3). The provisions as referred to in paragraph (2) do not apply to complaints as referred to in Article 25, Article 26, and Article 30; 4). Complaints can be withdrawn as long as the examination before the trial court has not started"⁶⁹.

Based on the new rules above, it is possible to criminalize polyamorous relationships even though they are not bound by marriage. Even though there is consent from the parties of each partner, if there is a complaint from the family members, the offender can be punished according to Articles 411 and 412 of the new Penal Code. The revised Code regulations penalize both extramarital sexual relations and cohabitation without legal recognition. Thus, polyamorous

Jurnal Hukum Prasada 9, no. 1 (14 Maret 2022): 20–27, <https://doi.org/10.22225/jhp.9.1.2022.20-27>.

⁶⁸ Fauzi, "Wamenkumham: Pasal kesusilaan di KUHP untuk melindungi masyarakat," *Antara News*, 14 Desember 2022, <https://www.antaraneews.com/berita/3304771/wamenkumham-pasal-kesusilaan-di-kuhp-untuk-melindungi-masyarakat>.

⁶⁹ Ardito Ramadhan, "Masyarakat Diharap Pahami Pesan Moral di Balik Pasal Perzinaan KUHP," *KOMPAS.com*, 2022, <https://nasional.kompas.com/read/2022/12/16/07000001/masyarakat-diharap-pahami-pesan-moral-di-balik-pasal-perzinaan-kuhp>.

couples can not only be accused of having intercourse but also because of living together without marriage. Of course, if there is a complaint, considering that the article mentioned above includes a complaint offense. Those entitled to make a complaint under the law are the perpetrator's parents or their children.

This latest regulation regarding the offense of adultery has drawn debate from various circles. Hotman Paris, a prominent legal practitioner in Indonesia, stated that the new regulation would have an impact on Indonesian tourism⁷⁰. From the business community, the Executive Director of the Indonesian Employers' Association (Apindo), Danang Girindrawardana, said that the adultery article was considered to be too personal. According to him, criminal threats from private affairs will encourage the next crime: negative publication, bullying, and systematic surveillance. The tourism industry, such as hotel and apartment operators or management, will be dragged into this criminal aspect⁷¹. In this matter, the Coordinating Minister for Politics, Law, and Security (Menkopolhukam), Mahfud Md, responded that the criticisms that emerged were due to not having read the articles in the new Penal Code carefully, so misunderstandings arose. The article has a moral message to call on people not to commit adultery. Furthermore, according to Mahfud, the adultery Article is a complaint offense that a person can only be subject to criminal penalties if the perpetrator's husband or wife, children, and parents make a complaint⁷².

Polyamorous act of married perpetrators under the former Penal Code

Adultery is an act of intercourse between a man and a woman outside of marriage.⁷³ There are three (3) main elements to determine an act referred to as adultery per article 284 of the old Penal Code. First, sexual intercourse with a woman or a man who is not her husband or his wife. Second, the provisions of Article 27 of the Indonesian Civil Code (KUHPerdata) apply to him which

⁷⁰ Surya Dua Artha Simanjuntak, "KUHP Baru: Isi Pasal 411 dan Pasal 412 yang Banyak Diperdebatkan," *Bisnis.com*, 8 Desember 2022, <https://kabar24.bisnis.com/read/20221208/16/1606652/kuhp-baru-isi-pasal-411-dan-pasal-412-yang-banyak-diperdebatkan>.

⁷¹ Ferry Sandi, "UU KUHP Disahkan, Siap-siap Pungli Merajalela, Ini Sebabnya," *CNBC Indonesia*, 2022, <https://www.cnbcindonesia.com/news/20221208142252-4-394990/uu-kuhp-disahkan-siap-siap-pungli-merajalela-ini-sebabnya>.

⁷² Kadek Melda Luxiana, "Mahfud Md: Orang-orang Kritik Pasal Zina KUHP Baru tapi Belum Baca," *detiknews*, 2022, <https://news.detik.com/berita/d-6463530/mahfud-md-orang-orang-kritik-pasal-zina-kuhp-baru-tapi-belum-baca>.

⁷³ Umi Rozah dan Erlyn Indarti, "Delik Zina : Unsur Substansial Dan Penyelesaiannya Dalam Masyarakat Adat Madura," *Masalah-Masalah Hukum* 48, no. 4 (16 Oktober 2019): 366–75; Ishaq Ishaq, "Kontribusi Konsep Jarimah Zina Dalam Pembaharuan Hukum Pidana Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 14, no. 1 (30 Juni 2014): 81–100, <https://doi.org/10.18326/ijtihad.v14i1.81-100>.

states that a man can only marry one woman or vice versa. Those subject to this article may not commit adultery with other people. If they do, it means they can be punished. Third, the perpetrator is in a marriage bond⁷⁴.

Based on the provisions above, polyamorous behaviour involving someone bound in marriage can be categorized as adultery because of fulfilling the main elements of adultery. Even so, it needs to be understood that the offense of adultery is an absolute complaint offense which determines that the act can only be punished if someone reports it⁷⁵. The complainer must be the wife/husband of the perpetrator per the provisions of the old Code Article 284. Otherwise, the report will not be accepted. Meanwhile, in a polyamorous relationship, there is consent from the partner (husband/wife) to have intimate or sexual relations with other people. In other words, polyamorous act even though it fulfills the elements of adultery cannot be criminalized because the legal wife or husband gives consent and does not report the act to be criminalized.

Polyamorous act of married perpetrators under the new Penal Code

Article 411 of the new Criminal Code stipulates that anyone who has intercourse with another person who is not her husband or wife will be criminalized because of adultery. The new Code article does not provide a clause on whether the perpetrator is subject to the provisions of Article 27 of the Civil Code or not. Thus, whether the perpetrator adheres to the principle of monogamy or not, he will be punished for adultery. In the same sense, polyamorists can also be criminalized for having intimate relations with partners who are not their husbands or wives. Article 411 of the new Code also stipulates that those who can complain about adultery are the legal spouse, children, and parents of the perpetrator. This is also what distinguishes it from the old code regarding complaints of adultery offenses which only stipulates that only the spouse of the perpetrator can report. The punishment sanction that will be given is one (1) year in prison or a fine of category II. Regarding the category of fines, it is explained in the provisions of the new Penal Code article 79 as shown in the following table:

Tabel 1. The category of fines in the new Penal Code (Law No. 1 of 2023)

Fine Category	fine amount (IDR)
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⁷⁴ Zulfiqar Bhisma Putra Rozi, "Perkembangan Delik Zina Dalam Yurisprudensi Hukum Pidana," *Veritas et Justitia* 5, no. 2 (27 Desember 2019): 286–301, <https://doi.org/10.25123/vej.v5i2.3612>.

⁷⁵ Muhammad Agung Dharmawan, "Analisis Yuridis Terhadap Ketentuan Perubahan Tindak Pidana Perzinaan Dari Delik Aduan Menjadi Delik Biasa," *Kumpulan Jurnal Mahasiswa Fakultas Hukum*, 31 Mei 2018, <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/2921>.

Category I	1,000,000 IDR
Category II	10,000,000 IDR
Category III	50,000,000 IDR
Category IV	200,000,000 IDR
Category V	500,000,000 IDR
Category VI	2,000,000,000 IDR
Category VII	5,000,000,000 IDR
Category VIII	50,000,000,000 IDR

Furthermore, regarding cohabitation, polyamorous perpetrators can also be criminally charged if it turns out that they live together like husband and wife with their extramarital partner. This is because the new Penal Code also regulates in article 412 that "Anyone who lives together as husband and wife outside of marriage shall be punished with imprisonment for a maximum of 6 (six) months or a maximum fine of category II". Because this cohabitation issue also includes a complaint offense, those who have the right to report in accordance with Article 412 are the legal spouse of the perpetrator, the child, and the parents ⁷⁶.

Criminalization of polyamorous behaviour involving same-sex (homosexual) couples in the New Penal Code

Both the old and new Penal Codes do not provide explicitly the criminalization of Lesbian, Gay, Bisexual, Transgender, and Queer Plus (LGBTQ+) people. In this case, the Coordinating Minister for Politics, Law, and Security (Menko Polhukam) Mahfud MD emphasized: "There is not a single article (of the new Penal Code) that says anyone who is LGBT will be punished". However, the new Criminal Code regulates acts of sexual harassment whether committed by the opposite sex or the same sex ⁷⁷. Provisions regarding sexual harassment are regulated in article 414 which reads:

"1) Everyone who commits obscene acts against other people who are different or of the same sex: a. In public, shall be punished with imprisonment for a maximum of 1 (one) year 6 (six) months or a maximum fine of category III; b. Forcibly by force or threat of violence, shall be punished with imprisonment for a maximum of 9 (nine) years; or c. published as pornographic content, shall be punished with imprisonment for a maximum of 9 (nine) years. 2) Every Person with Violence or Threats of Violence forces another person to commit

⁷⁶ M Julnis Firmansyah, "PBB Anggap KUHP Baru Ancam Kebebasan Masyarakat, Ini Penjelasan Anggota DPR Habiburokhman," 2022, <https://nasional.tempo.co/read/1666508/pbb-anggap-kuhp-baru-ancam-kebebasan-masyarakatini-penjelasan-anggota-dpr-habiburokhman>.

⁷⁷ Firmansyah.

obscene acts against him shall be punished with imprisonment for a maximum of 9 (nine) years”.

Based on the provisions above, sexual harassment whether committed by a different sex or the same sex will be subject to a criminal penalty of 1 year and 6 months or a maximum fine of 50 million (category III). If the act is carried out by coercion and with violence or threats of violence, an even more severe sanction will be imposed, namely a prison sentence of 9 years. Despite the existence of article 414 above, Hınca Pandjaitan (House of Representatives of the Republic Indonesia) thinks that the government needs to make explicit rules including *memorie van toelichting* (notes explaining the background of the article formulation) regarding LGBTQ+ to avoid multiple interpretations in the public sphere ⁷⁸.

If analyzed in depth, even though the new Penal Code does not mention homosexuality specifically, same-sex marriage is not legally recognized in Indonesia. More than that, articles 411 and 412 of the new code have the potential to criminalize same-sex including LGBTQ+ sexual behaviour because there is the possibility of complaints from families who disapprove of this relationship. Human Rights Watch (HRW) believes that Indonesia's new Penal Code infringes on human rights, as articles 411 and 412, addressing extramarital intercourse and cohabitation without marriage, respectively, potentially criminalize all same-sex relationships, including LGBTQ+ partnerships not legally recognized in Indonesia, and may even penalize sex workers.

In addition, from an Islamic perspective, polyamory is unacceptable because Islam places a premium on sexual morality and chastity within the context of marriage. Adultery is strictly prohibited and punished by harsh legal sanctions. From an Islamic viewpoint, polyamory is a violation of the sanctity of marriage and the religion's moral standards. This ban also applies to same-sex polyamorous relationships including LGBTQ+ relationship. The position against homosexual conduct derives from religious interpretation and carries considerable weight in Islamic doctrine. Under Islamic criminal law, adultery, which is considered a sinful or unlawful conduct, is subject to specific punishments. Adultery, which is defined as sexual activity outside of marriage, can result in severe punishments such as stoning or flogging. Polyamory involving extramarital sexual relations falls under the category of adultery and may be subject to such penalties. In addition, based on the aforementioned provisions, polyamory is an ordinary offense under Islamic Criminal Law and can be punished even without a complaint.

⁷⁸ Anonimous, “Gaduh Pasal LGBT di Rancangan KUHP (1),” kumparan, 2022, <https://kumparan.com/kumparannews/gaduh-pasal-lgbt-di-rancangan-kuhp-1-1yAlg213mRn>.

This is, of course, different from the provisions in the new Penal Code which determine the offences of adultery and cohabitation outside legal marriage which can touch on polyamory relationships as absolute complaint offences. Looking at the cultural values of Indonesian society, especially the teachings of Islam as a religion adhered to by the majority of citizens, the criminalization of polyamory should be included in the ordinary complaint offense so that it can be in line with the living norms in society

Conclusion

Polyamory is a form of consensual non-monogamy that not only recognizes the diversity of sexual partnerships but includes the possibility of loving more than one person and maintaining more than one relationship at the same time. In contrast to extramarital affairs, polyamory emphasizes the openness and consent of each involved in the relationship to have intimate or sexual relations with other people. An agreement between married couples to be able to have sexual relations with other people cannot be justified in Islamic teachings. It is not permitted for married men to have romantic relationships with women without going through a valid religious marriage first. While married women are prohibited from having sexual relations other than with their husbands. The woman can only relate to another man through a valid marriage bond on the condition that there has been a divorce from her first husband and has passed the iddah (waiting) period. In general, relations outside of legal marriage are considered adultery in Islam which requires criminal sanctions for the perpetrators. Polyamory cases involving same-sex couples which in Islamic teachings are known as *liwath* (gay) and *sihaq* (lesbian) are also included in the criminal category.

In the context of law in Indonesia, the term polyamory is not yet recognized in law. However, the new Penal Code in Indonesia can criminalize polyamorous perpetrators with the latest regulations on adultery and cohabitation offenses contained in articles 411 and 412. If in the old Penal Code single extramarital couples could not be criminalized, the new Penal Code stipulates that all forms of sexual relations outside of marriage can be criminalized. More than that, extramarital couples who live together or in cohabitation can also be punished under the provisions of Articles 411 and 412. As the article entails an absolute complaint offense, polyamorous individuals can only be prosecuted if a legal partner, child, or parent of the accused files a complaint or report. Given the wording of the articles on adultery and cohabitation, there is significant potential for criminalizing homosexual acts, including those involving LGBT individuals, provided there are complaints from the legal spouse, children, or parents of the involved parties. Considering the cultural values of Indonesian society, particularly the teachings of Islam as the religion practiced by the majority of the population, polyamory should be

included as a complaint offense so that it aligns with the norms living in the society.

This study has limitations because it primarily focuses on the perspective of Islamic law and the legal context in Indonesia. Therefore, future research is expected to conduct a comparative study to explore how different legal systems and religious perspectives address polyamory for a broader understanding. It is also desirable to conduct a study on the human rights implications of criminalising polyamory, especially in the context of gender equality and LGBTQ+ rights to assess potential conflicts between criminalisation and international human rights standards.

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