

**ISLAMIC LAW VALUES IN ARTICLE 411 CONCERNING ADULTERY  
IN THE NATIONAL PENAL CODE BASED ON JASSER AUDA'S  
MAQĀŞID SHARĪA PERSPECTIVE**

**THESIS**

**by:  
RIKI SANJAYA IHYARA  
SIN 19210139**



**ISLAMIC FAMILY LAW DEPARTEMENT  
SHARIA FACULTY  
STATE ISLAMIC UNIVERSITY MAULANA MALIK IBRAHIM  
MALANG  
2023**

**ISLAMIC LAW VALUES IN ARTICLE 411 CONCERNING ADULTERY  
IN THE NATIONAL PENAL CODE BASED ON JASSER AUDA'S  
MAQĀŞID SHARĪA PERSPECTIVE**

**THESIS**

**by:  
RIKI SANJAYA IHYARA  
SIN 19210139**



**ISLAMIC FAMILY LAW DEPARTEMENT  
SHARIA FACULTY  
STATE ISLAMIC UNIVERSITY MAULANA MALIK IBRAHIM  
MALANG**

**2023**

## STATEMENT OF THE AUNTENTICITY

In the name of Allah,

With consciousness and responsibility toward the development of science, the writer declares that thesis entitled:

**ISLAMIC LAW VALUES IN ARTICLE 411 CONCERNING ADULTERY  
IN THE NATIONAL PENAL CODE BASED ON JASSER AUDA'S  
MAQĀŞID SHARĪA PERSPECTIVE**

Is truly writer's original work which can be legally justified. If this thesis is proven result of duplication or plagiarism from another scientific work, it as precondition of degree will be stated legally invalid.

Malang, 17 June 2023

Writer,



Riki Sanjaya Ihyara

SIN 19210139

## APPROVAL SHEET

After reading and correcting thesis of Riki Sanjaya Ihyara Student ID 19210139,  
Department of Islamic Family Law, Sharia Faculty of The State Islamic  
University Maulana Malik Ibrahim of Malang entitled:

**“ISLAMIC LAW VALUES IN ARTICLE 411 CONCERNING ADULTERY  
IN THE NATIONAL PENAL CODE BASED ON JASSER AUDA'S  
MAQĀSĪD SHARĪA PERSPECTIVE”**

the supervisor stated that this thesis has met the scientific requirements to be  
proposed and to be examined on the Assembly Board of Examiners.

Malang, 17 June 2023

Acknowledge by,  
The Head Departmen of Islamic Family Law

Supervisor



Erik Sabti Rahmawati, MA., M.Ag.  
NIP. 197511082009012003



Jamilah, MA.  
NIP. 197901242009012007

## LEGITIMATION SHEET

The Assembly Board of Thesis Examiners of Riki Sanjaya Ihyara (19210139),  
Student of Islamic Family Law Department, Sharia Faculty of The State Islamic  
University Maulana Malik Ibrahim of Malang entitled:

**“ISLAMIC LAW VALUES IN ARTICLE 411 CONCERNING ADULTERY  
IN THE NATIONAL PENAL CODE BASED ON JASSER AUDA'S  
MAQĀSĪD SHARĪĀ PERSPECTIVE”**

Has been certified to pass with mark:

Board of Examiners

1. Erik Sabti Rahmawati, MA., M.Ag.

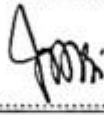
NIP. 197511082009012003

  
(.....)

Chairman

2. Jamilah, MA.

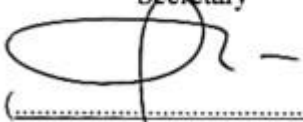
NIP. 197901242009012007

  
(.....)

Secretary

3. Dr. Zaenul Mahmudi, MA.

NIP. 197306031999031001

  
(.....)

Main Examiners

Malang, 17 June 2023

Dean,

  
Dr. Sudirman Hasan, MA.  
NIP 197708222005011903

MOTTO

وَلَا تَقْرُبُوا الزَّوْجَ إِنَّهُ كَانَ فَاحِشَةً <sup>قُل</sup> وَسَاءَ سَبِيلًا

“Do not go near adultery. It is truly a shameful deed and an evil way.”

## ACKNOWLEDGMENT

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Alhamdulillahirabbil'alamin, Allah Almighty have given *rahmat* and help, so we can finish this thesis entitled “Islamic Law Values in Article 411 Concerning Adultery in the National Penal Code Based on Jasser Auda's Maqāṣid Sharīa Perspective.” Peace be Upon into Rasulullah Prophet Muhammad PBUH who has taught us guidance (*uswatun hasanah*) to do activity correctly in our life. By following Him, may we belong to those who believe and get their intercession on the last day of the end. Amien.

From all the teaching, advice, guidance, and helps of service for us to finish this thesis, then with all humility the writer will expresses the gratitude which is unequalled to:

1. Prof. Dr. H. M. Zainuddin, MA. as the Rector of The State Islamic University Maulana Malik Ibrahim of Malang.
2. Dr. Sudirman Hasan, MA. as the Dean of Sharia Faculty of The State Islamic University Maulana Malik Ibrahim of Malang.
3. Mrs. Erik Sabti Rahmawati, MA., M.Ag. as the Head of Islamic Family Law Department of Sharia Faculty of The State Islamic University Maulana Malik Ibrahim of Malang
4. Mrs. Jamilah, MA. as my thesis supervisor. The writer thanks for his spending time to guide, direct, and motivate to finish writing this thesis. The writer hopes that he and his family will be blessed by Allah Almighty.

5. Dr. Zaenul Mahmudi, MA. as supervisor lecturer of the writer during his study at Islamic Family Law Department of Sharia Faculty of The State Islamic University Maulana Malik Ibrahim of Malang.
6. All lecturers at Sharia Faculty of the State Islamic University of Maulana Malik Ibrahim Malang who have provided learning to all of us. With sincere intentions, may all of their charity be part of worship to get the pleasure of Allah Almighty.
7. Staff of Sharia Faculty of The State Islamic University Maulana Malik Ibrahim of Malang.
8. My parents who always support me, always remind me and always give their best prayers for me.
9. To my friends ICP HKI 2019 class who have accompanied me from the third semester until now.
10. To my friends, Indra Maharani, Yuan Ilham Rafsanjani, Transida Yulia N. and Nur Abdillah who never get tired of helping me in all my processes, providing the best advice and support.

With the completion of this thesis report, the hope that knowledge which we have gained during our studies can provide the benefits of life in the world and the hereafter. As a human who has never escaped fault, the author is very hopeful for the forgiveness, criticism and suggestions from all parties for future improvement efforts.



## TRANSLITERATION GUIDENCE

The Latin Arabic Transliteration Guidelines which are the result of a joint decision decision (SKB) of the Minister of Religion and the Minister of Education and Culture of the Republic of Indonesia. Number: 158 of 1987 and Number: 0543b/U/1987.

### A. Consonants

A list of Arabic letters and their transliteration into Latin letters can be seen on the following page:

Arab Letters	Name	Lattin Letters	Name
ا	Alif	Not Symbolized	Not Symbolized
ب	Ba	B	Be
ت	Ta	T	Te
ث	S/a	Š	Es (with the dot above)
ج	Jim	J	Je
ح	Ha	Ĥ	Ha (with the dot above)
خ	Kha	Kh	Ka and Ha
د	Dal	D	De
ذ	Z/al	Ž	Zet (with the dot above)
ر	Ra	R	Er
ز	Zai	Z	Zet
س	Sin	S	Es
ش	Syin	Sy	Es and Ye
ص	Shad	Ş	Es (with the dot

Arab Letters	Name	Lattin Letters	Name
			below)
ض	Dhad	Ḍ	De (with the dot below)
ط	Tha	Ṭ	Te (with the dot below)
ظ	Za	Ẓ	Zet (with the dot below)
ع	‘Ain	‘	Apostrof backwards
غ	Gain	G	Ge
ف	Fa	F	Ef
ق	Qaf	Q	Qi
ك	Kaf	K	Ka
ل	Lam	L	El
م	Mim	M	Em
ن	Nun	N	En
و	Wau	W	We
هـ	Ha	H	Ha
ء / أ	Hamzah	‘	Apostrof
ي	Ya	Y	Ye

Hamzah (ء) which is located at the beginning of the word follows the vowel without any marking. If it is in the middle or at the end, it is written with a sign (‘).

## B. Vocal

Arabic vowels, like Indonesian vowels, consist of a single vowel or monophonic and multi vowels or dhipthongs. The Arabic single vowel whose symbol is a sign or vowel, the transliteration is as follows:

Sign	Name	Latin Letters	Name
آ	Fathah	A	A
إ	Kasrah	I	I
أ	Dhammah	U	U

Arabic double vowel whose symbol is a combination of vowels and letters, the transliteration is a combination of letters, namely:

Sign	Name	Latin Letters	Name
آ & ي	Fathah and ya	Ai	A and I
آ & و	Fathah and wau	Au	A and U

Example:

كَيْفَ : *kaifa*

حَوْلَ : *hauila*

### C. Maddah

Maddah or long vowels whose symbols are vowels and letters, transliteration in the form of letters and signs, namely:

Harakat and Letters	Name	Letters and Sign	Name
آ & ا / ي	Fathah and alif or ya	ā	a and the line above
إ & ي	Kasrah and ya	ī	i and the line above

وُ & و	Dammah and wau	Ū	u and the line above
--------	----------------	---	----------------------

Example:

مَاتَ : *māta*

رَامَ : *rāma*

قِيلَ : *qīla*

يَمُوتُ : *yamūtu*

#### D. Ta'Marbutah

There are two transliterations for ta' marbutah, namely ta' marbutah who live or get the letters fathah, kasrah, and ḍammah, the transliteration is [t]. While ta' marbutah who dies or get a sukun harakat, the transliteration is [h].

If the word ending with ta' marbutah is followed by a word that uses the article al- and the reading of the word is separate, then ta' marbutah is transliterated with [h].

الْمَدِينَةُ : *al-madinah*

### E. Syaddah (Tasydid)

Syaddah or tasydid which in the Arabic writing system is denoted by a tasydid sign ( ّ ), in this transliteration it is symbolized by a repetition letters (double consonants) marked with a syaddah. Example:

رَبَّنَا : *rabbana*

الْحَقُّ : *al-haqq*

If latter i there is tasydid at the end of a word and preceded by the letter kasrah, then it is transliterated like the letter maddah (i). Example:

عَلِيٍّ : *'Ali (not 'Aliyy or 'Aly)*

عَرَبِيٍّ : *'Arabi (not 'Arabiyy or 'Araby)*

### F. Sandang Word

Sandang word in the Arabic writing system are denoted by letters (alif lam ma'arifah). In this transliteration guide, the article is transliterated as usual, al-, both when is followed by letter syamsiah and the letter qamariah. The article does not follow the sound of the direct letter that folloes it. The article is written separately from the word that follows it and is connected by a horizontal line (-). Example:

الشَّمْسُ : *al-syamsu (not asy-syamsu)*

الزَّلْزَلَةُ : *al-zalزالah* (not *az-zalزالah*)

الْفَلْسَفَةُ : *al-falsafah*

الْبِلَادُ : *al-bilādu*

### G. Hamzah

The rule for transliterating the letter hamzah into an apostrophe (‘) only applies to hamzah which is located in the middle and end of the word. However, if hamzah is at the beginning of a word, it is not symbolized, because in Arabic it is an alif. Example:

تَأْمُرُونَ : *ta’ murūna*

شَيْءٌ : *syai’un*

أُمِرْتُ : *umirtu*

### H. Writing Arabic words commonly used in Indonesian

Transliterated Arabic words, terms or sentences are words, terms or sentences that have not been standardized in Indonesian. Words, terms or sentences that are commonplace and become part of the Indonesian vocabulary, or have often been written in Indonesian writing, are no longer

written according to the transliteration method above. For example the word Al-Qur'an (from the Qur'an), *Sunnah, khusus and umum*. However, if these words are part of a series of Arabic texts, then they must be transliterated in their entirety. Example:

*Fī zilāl al-Qur'an*

*Al-Sunnah qabl al-tadwīn*

*Al-'Ibārat bi 'umūm al-lafz bi khusūṣ al-sabab*

#### 1. *Lafz al-Jalalah*

The word Allah which is preceded by a particle such as the letter jarr and other letters or is located as a mudlaf ilaih (nominal phrase), is transliterated without the letter hamzah. As for the ta' marbutah at the end of the word that is attributed to al-jalalah, it is transliterated with the letter [t]. Example:

دِينُ اللَّهِ : dinullah

رَحْمَةِ اللَّهِ : rahmatillah

#### 2. Capital

Although the Arabic writing system does not recognize capital letters (All Caps), in its transliteration these letters are subject to provisions regarding the use of capital letters based on the applicable Indonesian spelling guidelines (EYD). Capital letters, for example, are used to write the first letter of a personal name is preceded by an article (al-), then what is written in capital letters remains the initial

letter of the personal name, not the initial letter of the article. If it is located at the beginning of the sentence, then the letter A of the article uses a capital letter (Al-). The same provisions also apply to the initial letter of the reference title preceded by the article al-, both when it is written in the text and in the reference notes (CK, DP, CKD, and DR).

Example:

وما مُجَّد إِلَّا رَسُول : Wa mâ Muhammadun illâ Rasûl

إِن أَوَّل بَيْتٍ وَضِعَ لِلنَّاسِ : Inna Awwala baitin wuḍi'a linnâsi

شَهْرَ رَمَضَانَ الَّذِي أُنزِلَ فِيهِ الْقُرْآنُ : 'Syahru Ramaḍān al-laẓī unzila fih  
al-Qur'an



## TABLE OF CONTENT

COVER PAGE .....	i
TITLE PAGE .....	ii
STATEMENT OF THE AUNENTICITY .....	iii
APPROVAL SHEET .....	iv
LEGITIMATION SHEET .....	v
MOTTO .....	vi
ACKNOWLEDGMENT .....	vii
TRANSLITERATION GUIDENCE .....	ix
TABLE OF CONTENT .....	xvii
TABLES .....	xix
ABSTRAK .....	xx
ABSTRACT .....	xxi
ملخص البحث .....	xxii
CHAPTER I: INTRODUCTION .....	1
A. Research Background .....	1
B. Statement of The Problem .....	6
C. Research Purposes .....	6
D. Benefits of Research .....	6
E. Operational Definition .....	7
F. Research Methods .....	8
G. Previous Research .....	13
H. Structure of Discussion .....	20
CHAPTER II: LITERATURE REVIEW .....	21
A. Adultery ( <i>zina</i> ) in Islamic Law .....	21
B. Adultery ( <i>zina</i> ) in National Penal Code .....	25
C. Maqāṣid Sharīa in Jasser Auda's Perspective .....	27
CHAPTER III: RESULTS AND DISCUSSION .....	37
A. Philosophical, Sociological, and Juridical Foundation as the Urgency of	

National Penal Code (KUHP) Reform .....	37
B. The Urgency of National Penal Code (KUHP) Reform Related to the <i>Delict</i> of Adultery .....	43
C. Provisions on the Crime of Adultery in the Former Penal Code ( <i>Wetboek van Strafrecht</i> ) and National Penal Code .....	47
D. Provisions on the Crime of Adultery in the National Penal Code and Islamic Law .....	50
E. Islamic law values in the Article on Adultery in the National Penal Code .....	56
F. Islamic Law Values in the National Penal Code Viewed from Jasser Auda's System Approach .....	57
G. Islamic Law Values in the National Penal Code Related to the Adultery <i>Delict</i> in the Contemporary Maqāṣid Sharīa Perspective .....	59
CHAPTER IV: CLOSING .....	66
A. Conclusion .....	66
B. Suggestion .....	68
BIBLIOGRAPHY .....	69
APPENDIXES	
CURICULUM VITAE	

## TABLES

Table 1.1 Previous Research (Cluster I) .....	15
Table 1.2 Previous Research (Cluster II) .....	18
Table 2.1 Jasser Auda's Education .....	29
Table 2.2 Comparison of Classical Concepts To Contemporary Concepts .....	36
Table 3.1 Comparison of Development Adultery <i>Delict</i> in the Former Penal Code ( <i>Wetboek van Strafrecht</i> ) Toward the National Penal Code From Several Aspects .....	50
Table 3.2 Comparison of Adultery ( <i>zina</i> ) in Islamic Law and the National Penal Code From Several Aspects .....	55

## ABSTRAK

Riki Sanjaya Ihyara, 19210139, Nilai-Nilai Hukum Islam pada Pasal 411 Tentang Perzinahan dalam KUHP Nasional Berdasarkan Maqāshid Syarīah Perspektif Jasser Auda, Skripsi, Program Studi Hukum Keluarga Islam, Fakultas Syariah, Universitas Islam Negeri Maulana Malik Ibrahim Malang, Pembimbing Jamilah, MA.

---

---

Kata Kunci: Perzinahan, KUHP Nasional, Maqāshid Syarīah

Reformasi KUHP (*Wetboek van Strafrecht*) yang merupakan warisan kolonial Belanda menuju KUHP Nasional merupakan perjalanan panjang bangsa Indonesia dalam membentuk undang-undang negara (*wettelijk regeling*) yang memiliki “cita rasa khas Indonesia” di ranah hukum pidana. Tentu saja, perjalanan panjang KUHP Nasional yang baru tersebut tidaklah mudah. Beberapa pasal di dalamnya (termasuk pasal tentang perzinahan) dinilai bermasalah dan menimbulkan polemik di masyarakat. Tujuan dari penelitian ini adalah menganalisa nilai-nilai hukum Islam pada pasal perzinahan dalam KUHP Nasional. Mengingat, Indonesia merupakan negara yang mayoritas beragama Islam. Meskipun KUHP Nasional sudah mengkomodir nilai-nilai hukum Islam dan nilai-nilai khas keindonesiaan. Namun, masih terdapat penolakan oleh sebagian masyarakat.

Penelitian ini berjenis penelitian normatif (*normative research*) yang menggunakan pendekatan perundang-undangan (*statute approach*) dan pendekatan konseptual (*conceptual approach*). Penelitian ini menggunakan jenis data sekunder yang berupa bahan hukum primer, bahan hukum sekunder serta bahan hukum tersier.

Hasil dari penelitian ini secara garis besar: 1) terdapat beberapa urgensi dalam pembentukan KUHP Nasional dan juga dalam pasal perzinahan didalam KUHP Nasional; 2) terkait dengan istilah ‘zina’, dalam KUHP Nasional dan hukum Islam memiliki definisi yang sama secara umum dan juga keduanya melarang perzinahan, namun jenis delik, sanksi dan pembuktiannya berbeda; 3) KUHP Nasional, khususnya pasal tentang perzinahan telah selaras dengan konsep pendekatan sistem Jasser Auda (yaitu dalam fitur kognitif dan fitur keterbukaan) dan konsep Maqāshid Syarīah kontemporer Jasser Auda (yaitu dalam konsep *hifz nasl*, *hifz ‘aql*, *hifz al-‘ird*, *hifz al-din*).

## ABSTRACT

Riki Sanjaya Ihyara, 19210139, Islamic Law Values in Article 411 Concerning Adultery in the National Penal Code Based on Jasser Auda's Maqāṣid Sharīa Perspective, Thesis, Islamic Family Law Study Program, Faculty of Sharia, State Islamic University Maulana Malik Ibrahim Malang, Supervisor Jamilah, MA.

---

---

Keywords: Adultery, National Penal Code, Maqāṣid Sharīa

The reformation of the Penal Code (*Wetboek van Strafrecht*), which is a Dutch colonial legacy, toward the National Penal Code is a long journey of the Indonesian people in forming a state law (*wettelijk regeling*) that has a “distinctive Indonesian flavor” in the realm of criminal law. Of course, the long journey of the new National Penal Code is not easy. Several articles in it (including the article on adultery) are considered problematic and cause polemics in the community. The purpose of this study is to analyze the values of Islamic law on adultery articles in the National Penal Code. Given, Indonesia is a predominantly Muslim country. Although the National Criminal Code has accommodated the values of Islamic law and typical Indonesian values. However, there is still rejection by some people.

This research is a type of normative research that uses a statute approach and a conceptual approach. This research uses secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials.

The results of this research are mainly: 1) there are several urgencies in the establishment of the National Penal Code and also in the article on adultery in the National Penal Code; 2) related to the term ‘*zina*’ (adultery), the National Penal Code and Islamic law have the same definition in general and also both prohibited adultery, but the types of delict, sanctions and proving are different; 3) the National Penal Code, especially the article on adultery is in accordance with the concept of Jasser Auda's system approach (namely in cognitive features and openness features) and the concept of Jasser Auda's contemporary Maqāṣid Sharīa (namely in concepts *hifz nasl*, *hifz ‘aql*, *hifz al-‘ird*, *hifz al-din*).

## ملخص البحث

ريكي سانجايا إيهيارا، ١٩٢١٠١٣٩، قيم الشريعة الإسلامية في المادة ٤١١ عن الزنا في القانون الجنائي الوطني وفق مقاصد الشريعة لياسر عودة. رسالة جامعية، قسم القانون العائلي الإسلامي، كلية الشريعة، جامعة إسلامية حكومية مولانا مالك إبراهيم مالانج. مشرفة: الأستاذة جميلة، م أ.

---

---

الكلمات الرئيسية: الزنا، القانون الجنائي الوطني، مقاصد الشريعة

إن تحويل قانون الجنائي الموروث من الاستعمار الهولندي إلى قانون الجنائي الوطني يعتبر رحلة طويلة للشعب الإندونيسي في صياغة النظام القانوني بطعمة إندونيسية في مجال القانون الجنائي. وهذا التحويل إلى القانون الجنائي الوطني الجديد ليس سهلاً طبعاً لما وقع فيه من المعارضات والجدل على بعض المواد بين المجتمع، منها ما وقع في المادة عن الزنا. فتهدف هذه الدراسة لتحليل قيم الشريعة الإسلامية في مادة الزنا في القانون الجنائي الوطني لكثرة الشعب الإسلامي في إندونيسيا. وعلى الرغم من أن القانون الجنائي الوطني قد استوعب قيم الشريعة الإسلامية والقيم الخاصة بإندونيسيا، لكن المعارضة لا تزال موجودة من قبل بعض المجتمع.

هذه الدراسة هي من نوع البحث النظري الذي يستخدم المنهج القانوني والمنهج المفهومي، وهي تقوم على البيانات الثانوية التي تشمل المواد القانونية الأساسية والمواد القانونية الثانوية والمواد القانونية الثالثة.

خلاصة هذه الدراسة إجمالاً:

- أ. ضرورة تشكيل القانون الجنائي الوطني ومنها المادة المتعلقة بالزنا.
- ب. اتفاق القانون الجنائي الوطني والشريعة الإسلامية في تعريف الزنا عموماً، واختلافهما في نوع الجريمة والعقوبة وطريقة إثباتها
- ج. موافقة القانون الجنائي الوطني (وبالأخص المادة المتعلقة بالزنا) مع مفهوم نظام ياسر عودة (ميزة المعرفة وميزة الشفافية) ومفهوم مقاصد الشريعة الإسلامية المعاصرة لياسر

عودة.

# CHAPTER I

## INTRODUCTION

### A. Research Background

The reform of the Penal Code (KUHP) began in 1963 when the First National Legal Seminar was held which resulted in various resolutions. One of them is the urge to complete the National Penal Code (KUHP Nasional) immediately.<sup>1</sup> There are three reasons for the urgency of reforming the Penal Code. First, from the political aspect, it is natural for Indonesia as an independent country to have its own National Penal Code as a political identity. Second, from the sociological aspect, it is a reflection of the political ideology of a nation where the law develops. Thus, cultural and social values are accommodated in the regulations in the National Penal Code. Third, from the practical aspect, it is known that the applicable Penal Code is *WvS (Wetboek van Strafrecht)* which is in the Dutch language, so it is required to understand the Dutch language in order to be applied correctly. Because it uses the Dutch language, Penal Code is considered to cause confusion in the application of the rules of the Penal Code in Indonesia. Therefore, it is necessary to reform the Penal Code (KUHP) to the National Penal Code (KUHP Nasional).<sup>2</sup>

The drafting of the RKUHP (Draft Bill of Penal Code) was started by the

---

<sup>1</sup> Nuzul Rahmayani, "Urgensi Rekonstruksi Ketentuan Pasal 284 KUHP Berbasis Nilai-Nilai Pancasila," *MENARA Ilmu*, Vol. X Jilid 1 No.70 September 2016: 111  
<https://jurnal.umsb.ac.id/index.php/menarailmu/article/view/99/81>

<sup>2</sup> Hanafi Amrani, *Politik Pembaruan Hukum Pidana*, (Yogyakarta : UII Press, 2019), 11-12.



government in 1970 to replace the Penal Code inherited from the colonizers. The drafting team at that time was chaired by Prof. Sudarto and supported by some other Criminal Law Professors in Indonesia. Unfortunately, the effort to submit the RKUHP to the DPR (the House of Representatives) and discuss it has never been realized.

The new team for the reform of the Penal Code was formed in 2004 under Prof. Dr. Muladi, S. H.,. Then in 2012, the RKUHP was submitted by the 6th President of Indonesia, Susilo Bambang Yudhoyono to the DPR for discussed. Then, the RKUHP's draft was agreed upon in decision-making by the DPR for the 2014-2019 period. Unfortunately, polemics arose in the community. Protest after protest emerged from the community, including from students and legal activists regarding several articles in the RKUHP.

The adultery article is one of the articles that is judged to be problematic in the RKUHP. The expansion of the meaning of adultery (*zina*) in the adultery article is judged that the state has entered the private sphere of citizens. The expansion of the offense of adultery is also considered to have the potential to be misused, has the potential to cause conflict in society, and has the potential to create new victimization situations (secondary victimization) and overcriminalization.<sup>3</sup> In fact, the Indonesian Legal Aid Foundation (YLBHI) considers that the expansion of the adultery *delict* violates basic human rights and causes discrimination. This was conveyed in the Plenary Session Room of

---

<sup>3</sup> Azka Rasyad Alfatdi, Inez Andriana Regita Cahyani, dan Sabrina Khusnannisa, "Menelisik Lebih Dalam Pengaturan Tindak Pidana Perzinahan dalam RKUHP Melalui Berbagai Pandangan," *Jurnal Studia Legalia : Jurnal Ilmu Hukum*, Volume 3 Nomor 1, Oktober 2022: 15  
<https://studialegalia.ub.ac.id/index.php/studialegalia/article/view/21/19>

the Constitutional Court (Mahkamah Konstitusi) in the 9th hearing of case No. 46/PUU-XIV/2016.<sup>4</sup>

Then, the 7th President of Indonesia, Joko Widodo decided to postpone the ratification of the RKUHP, and related to problematic articles, he ordered a review, in September 2019. Then, in April 2020, the discussion of the RKUHP was officially resumed by the DPR. The discussion also continued, with the DPR targeting the RKUHP draft to be ratified in July 2022. Unfortunately, there was a delay in the ratification of the RKUHP in addition to the many agreements and disagreements regarding several articles in the RKUHP which were judged to be problematic.<sup>5</sup>

On December 6, 2022, in a plenary meeting of the DPR-RI (the House of Representatives of the Republic of Indonesia), the RKUHP was ratified into law (Undang-Undang).<sup>6</sup> Finally, on Monday, January 2, 2023, President Joko Widodo officially legitimize the National Penal Code by signing the *beleid*. The National Penal Code was officially legislated and became a state sheet through Law Number 1 of 2023 concerning the Penal Code (KUHP).<sup>7</sup> As

---

<sup>4</sup> MKRI, “YLBHI: Perluasan Definisi Zina Berdampak pada HAM,” *mkri.id*, 26 September 2016, accessed on Januari 7, 2023, <https://www.mkri.id/index.php?page=web.Berita&id=13326>

<sup>5</sup> Issha Harruma, “Sejarah KUHP dan Perjalanan Menuju KUHP Baru,” *Kompas*, 5 Juli 2022, accessed on October 7, 2022, <https://nasional.kompas.com/read/2022/07/05/01500051/sejarah-kuhp-dan-perjalanan-menuju-kuhp-baru>

<sup>6</sup> Ferry Sandi, “104 Tahun RI Pakai Hukum Belanda, Kapan KUHP Baru Berlaku?,” *CNBC Indonesia*, 8 Desember 2022, accessed on January 2, 2023, <https://www.cnbcindonesia.com/news/20221208162013-4-395032/104-tahun-ri-pakai-hukum-belanda-kapan-kuhp-baru-berlaku>

<sup>7</sup> Adi Ibrahim, “Jokowi Resmi Sahkan KUHP Baru Jadi Undang-undang,” *CNN Indonesia*, 2 Januari 2023, accessed on January 10, 2023, <https://www.cnnindonesia.com/nasional/20230102210655-12-895245/jokowi-resmi-sahkan-kuhp-baru-jadi-undang-undang>

quoted from the final draft of the RUU KUHP<sup>8</sup>, the New Penal Code is applicable after 3 (three) years from the time of its enactment.<sup>9</sup>

This research focuses on the article on adultery in the National Penal Code (2023). Like a number of other articles, the articles on adultery are also not separate from approval and disapproval. Among those who support this article is Supardi Ahmad, a Criminal Law expert from Al-Azhar University who argues that the expansion of the adultery article is an effort to protect women.<sup>10</sup> Ikhsan Abdullah, the Legal Commission of the Indonesian Ulema Council (MUI) agreed to this expansion of the meaning of adultery (*zina*), he stated that what is meant by adultery (*zina*) is intercourse between a man and a woman without a marriage relationship, if something like this is allowed it will become a tradition, it is not in accordance with any culture and all religions prohibit adultery.<sup>11</sup>

On the other side, there are also those who do not support the article, as expressed by the Chairman of the Regional Administrative Council (DPD) of the Indonesian Hotel and Restaurant Association (PHRI) of Yogyakarta, Deddy Pranawa Ernawa, according to him, if tourists who stay in hotels are not married couples in one room, they can be criminalized with the threat of a

---

<sup>8</sup> The establishment of the National Penal Code has been a long journey for the Indonesian people. There are several versions of the RUU KUHP (Draft Bill of Penal Code) until the last one is the RUU KUHP of 2022 (Final Draft December 6). Can be downloaded at

<https://www.hukumonline.com/pusatdata/detail/17797/rancangan-undang-undang-2022>

<sup>9</sup> Article 624 of the Draft Bill of Penal Code (RUU KUHP) of 2022 (Final Draft December 6).

<sup>10</sup> Fauzi, "Pakar: Pasal perzinaan di RUU KUHP upaya melindungi perempuan," *ANTARA*, 9 Juni 2021, accessed on October 1, 2022, <https://www.antaraneews.com/berita/2201958/pakar-pasal-perzinaan-di-ruu-kuhp-upaya-melindungi-perempuan>

<sup>11</sup> Samsudhuha Wildansyah, "MUI Setuju Perluasan Makna Zina di RUU KUHP," *detikNEWS*, 21 September 2019, accessed on October 1, 2022, <https://news.detik.com/berita/d-4715688/mui-setuju-perluasan-makna-zina-di-ruu-kuhp/2>

high enough fine and as a result, there is a decrease in foreign tourists visiting Indonesia.<sup>12</sup> Hariyadi Budi, Chairman of the Indonesian Employers Association (Apindo), also expressed his disagreement with the adultery article, he stated that the criminal regulation of adultery is closely related to moral matters, however, adultery is included in the private sphere, which the state should not regulate and is not a criminal act.<sup>13</sup>

These polemics make the National Penal Code (2023), especially the article on adultery, interesting to study. Given that Indonesia is a country with a majority of Muslims. This is shown by the Muslim population in Indonesia in 2023 reached 229 million out of approximately 277 million people (87.2%).<sup>14</sup>

Indonesia is a country that has the 'Pancasila' ideology. This means that the nation's life must be in accordance with the values contained in Pancasila, including religious values. Although the National Penal Code has accommodated Indonesian values (values that characterize Indonesian society) and Pancasila, there is still rejection by some people.

---

<sup>12</sup> Shani Rasyid, "Pasal Perzinahan di RUU KUHP Bisa Kontraproduktif, Ini Penjelasan PHRI DIY," *Merdeka.com*, 26 Oktober 2022, accessed on October 29, 2022, <https://www.merdeka.com/jateng/pasal-perzinahan-di-ruu-kuhp-bisa-kontraproduktif-ini-penjelasan-phri-diy.html>

<sup>13</sup> Tim TvOne, Antara, "Pasal Zina dalam RUU KUHP, Wisatawan Asing Bakal 'Kabur' ke Negara Lain," *tvOnenews*, 20 Oktober 2022, accessed on October 25, 2022, <https://www.tvonenews.com/berita/nasional/76082-pasal-zina-dalam-ruu-kuhp-wisatawan-asing-bakal-kabur-ke-negara-lain>

<sup>14</sup> Anonymous, "Muslim Population by Country 2023," *World Population Review*, 2023, accessed on April 10, 2023, <https://worldpopulationreview.com/country-rankings/muslim-population-by-country>

**B. Statement of The Problem**

1. What are the urgencies of the adultery *delict* reform in National Penal Code?
2. What are the values of Islamic law contained in the article on adultery in the National Penal Code?
3. How are the values of Islamic law in the article on adultery in the National Penal Code in the review of Maqāṣid Sharīa from Jasser Auda's perspective?

**C. Research Purposes**

1. To analyze the urgencies of the adultery *delict* reform in National Penal Code.
2. To identify the values of Islamic law contained in the article on adultery in the National Penal Code.
3. To analyze the values of Islamic law in the article on adultery in the National Penal Code in the review of Maqāṣid Sharīa from Jasser Auda's perspective.

**D. Benefits of Research**

1. Theoretical Benefits

To contribute to the scientific treasures of Islamic family law, criminal law, and Islamic legal philosophy, especially related to Maqāṣid Sharīa on

Jasser Auda's perspective for researchers and academics who have a concentration in these sciences.

## 2. Practical Benefits

- a. As additional knowledge about the Islamic law values in article 411 concerning adultery in the National Penal Code based on Jasser Auda's Maqāṣid Sharīa perspective.
- b. As additional to the literature for both readers and writers.

## E. Operational Definition

To make it easier for readers to understand what the author wants to convey in the research entitled “Islamic Law Values In Article 411 Concerning Adultery In The National Penal Code Based On Jasser Auda's Maqāṣid Sharīa Perspective,” the author will explain the important definitions contained in the title as following:

### 1. Adultery (*zina*)

In the Big Indonesian Dictionary (KBBI), *zina* (adultery) is defined as (1) the activity of intercourse between a man and a woman without a marriage relationship; (2) the act of intercourse between a man who is under marriage to a woman who is not his wife, or a woman who is under marriage with a man who is not her husband.<sup>15</sup>

### 2. Islamic Law

The law that comes from the religion of Islam. That is the law derived

---

<sup>15</sup> KBBI Daring, *Kementerian Pendidikan, Kebudayaan, Riset, dan Teknologi Republik Indonesia*, accessed on October 20, 2022, <https://kbbi.kemdikbud.go.id/entri/zina>

by Allah Almighty for the *maslahat*<sup>16</sup> of His worshipers both in this world and hereafter (*akhirat*).<sup>17</sup> The term “Islamic Law” refers to two things, namely *sharīa* and *fiqh*. *Sharīa* is all the rules set by Allah Almighty, both through the Qur’an or the sunnah of the Prophet Muhammad PBUH. In comparison, *fiqh* is the science of finding out the laws of *sharīa*, which are practical (*amaliyah*) and are sought from detailed arguments (*dalil-dalil terperinci*).<sup>18</sup>

### 3. Maqāṣid Sharīa

Maqāṣid Sharīa is the purpose, goal, end result in the form of essential benefit (*maslahat hakiki*) with the establishment of law on humans.<sup>19</sup>

## F. Research methods

The method is also referred to as a way, technique, or way to do something in an easier or more organized way. This research method is used by the author in order to make it easier for the writer to conduct research. The research method is also a tool to facilitate the steps taken by researcher to process the data in this study. So that in each process of collecting and analyzing data can be arranged neatly and efficiently.

### 1. Type of Research

In this research, it is included in normative legal research (in Dutch:

---

<sup>16</sup> In the Big Indonesian Dictionary (KBBI), *maslahat* means: something that brings goodness (safety and so on); benefit; use. <https://kbbi.kemdikbud.go.id/entri/maslahat>

<sup>17</sup> Muchammad Ichsan, *Pengantar Hukum Islam*, (Yogyakarta: Percetakan Muhammadiyah “Gramasurya”, 2015), 2.

<sup>18</sup> Muchammad Ichsan, *Pengantar Hukum...*, 4-5.

<sup>19</sup> H. Abdul Helim, *MAQĀṢID AL-SHARĪ’AH versus UŞŪL AL-FIQH (Konsep dan Posisinya dalam Metodologi Hukum Islam)*, (Yogyakarta: Pustaka Pelajar, 2019), 9.

*normatif juridisch onderzoek*). Normative legal research is usually “only” a document study, which uses legal sources in the form of legislation, court decisions, contracts/agreements/accords, legal theories, and the opinion of scholars. Another name for normative legal research are dogmatic legal research or doctrinal legal research, also referred to as library research or document studies.<sup>20</sup> In this research, researcher use legislation, namely the National Penal Code, as the object to be studied.

## 2. Research Approach

In this research, researcher used several research approaches. The statute approach is carried out by reviewing all legislation and regulations related to the legal issues being discussed (researched).<sup>21</sup> In this matter, the researcher will analyze the articles in the laws and regulations (such as: the National Penal Code (KUHP Nasional), the Penal Code (*Wetboek van Strafrecht*), the 1945 Constitution of the Republic of Indonesia, the Criminal Procedure Code (KUHP), the Law on Information and Electronic Transactions, etc.) related to the crime of adultery, and logically link the legislations. This approach can also be called Shari'a Approach if it uses the Qur'an and hadith as a basic footing.<sup>22</sup> In this matter, the researcher also uses several Surahs in the Qur'an (such as: Surah al-Isra verse 32, Surah an-Nur verse 2) and hadith from Ubadah ibn ash-Shamit as the basic footing in studying the crime of adultery.

---

<sup>20</sup> Muhaimin, *Metode Penelitian Hukum*, (Mataram: Mataram University Press, 2020), 45.

<sup>21</sup> Muhaimin, *Metode Penelitian Hukum...*, 56.

<sup>22</sup> Tim Penyusun, *Pedoman Penulisan Karya Ilmiah Fakultas Syariah UIN Maulana Malik Ibrahim Malang*, (Malang: t.p., 2022), 19.



Then, researcher in this study also used a conceptual approach. The conceptual approach is to examine concepts that come from doctrines and views that develop in legal and religious sciences.<sup>23</sup> In this research, the researcher tries to investigate adultery. Furthermore, the researcher examines article 411 on adultery in the new Penal Code (National Penal Code) using the concept of Maqāṣid Sharīa from Jasser Auda (the researcher uses the idea of A Systems Approach in Maqāṣid Sharīa and Reorientation of the Classical Maqāṣid Sharīa Concept Toward Contemporary Maqāṣid Sharīa Concept popularized by Jasser Auda).

### **3. Legal Material**

What is meant by legal material in this research is where the material can be obtained, of course in normative research uses three legal materials, namely: primary legal materials, which include the National Penal Code (2023), the Penal Code (*Wetboek van Strafrecht*), the 1945 Constitution of the Republic of Indonesia, the Holy al-Qur'an, etc.

Then, secondary legal materials include books such as Islamic Criminal Law, Principles of Criminal Law, Criminal Law, Jinayah Jurisprudence, Maqasid Al-Shariah As Philosophy Of Islamic Law: A Systems Approach, etc. Also, legal journals, research in the form of reports, and several other scientific works related to the topic under study. Finally, tertiary legal materials such as the Big Indonesian Dictionary (KBBI).

---

<sup>23</sup> Tim Penyusun, *Pedoman Penulisan Karya Ilmiah Fakultas Syariah ...*, 20.

#### **4. Method of Collecting Data**

This is a methodological matter related to techniques for collecting legal materials. Researcher choose to use literature study and analysis of legal materials, given that this type of research is normative research. literature study can begin by collecting legal materials, either primary, secondary, or tertiary, then analyzing the legal materials.

#### **5. Data Processing Methods**

This data processing method will be explained by the researcher into several necessary steps, including:

a. Editing

The data obtained, at this stage will be examined by researcher based on the completeness of legal materials, clarity of meaning, and compatibility of legal materials with other legal materials carried out by legal material searchers. In this study, researcher conducted editing of legal materials obtained from Law Number 1 of 2023 concerning the Criminal Code, books that discuss Islamic criminal law, Jasser Auda's book which discusses about Maqāṣid Sharīa.

b. Classifying

Researcher classify all legal materials obtained from the results of literature studies. The legal materials obtained were studied carefully. Then, grouped according to the need so that the legal material that has been obtained is easy to read and understand and provides objective information. Then, the legal materials are grouped based on the

similarities and differences between one legal material and another.

c. Verifying

As a further step, researcher re-examine all legal materials that have been collected so that the legal materials to be used in this study are in accordance with the theme and title of the research, namely Islamic law values in article 411 concerning adultery in the National Penal Code based on Jasser Auda's Maqāṣid Sharīa perspective so that the legal material can be recognized and used in research.

d. Analyzing

Analysis of legal materials is carried out as an activity of providing a review which can mean opposing, criticizing, supporting, adding, or commenting and then making a conclusion on the research results with one's own mind with the help of the theory that has been used.<sup>24</sup> In this research, researcher conducted a review of article 411 on adultery in the National Penal Code. Then, after being analyzed, the researcher studied it with Jasser Auda's Maqāṣid Sharīa theory. Because this is qualitative research, the results of the analysis are descriptive, and the nature of the analysis is prescriptive.

e. Conclusion

Drawing conclusions is conducted after the analysis stage has been carried out. This step is taken to provide the final results of the research results used to answer the statement of the problem. In this

---

<sup>24</sup> Muhaimin, *Metode Penelitian Hukum...*, 71.

study, drawing conclusions was carried out using the deductive method, namely drawing conclusions from general matters to be able to draw conclusions that are specific.

## G. Previous Research

In this research, one of the purposes is to find a fact or something that is still vague. In order for this research to be completed properly, of course, references related to this research are needed. In this part, researcher will describe previous studies that have been conducted previously on the same topic or theme.

This previous research is needed by researcher as a comparison with previous research with the same topic or theme and can make it easier for researcher to find out the differences in research that researcher have with previous research.

The researcher categorizes the previous studies into two clusters. Cluster I is previous research with topics or themes related to adultery. Cluster II is previous research with topics or themes related to Jasser Auda's Maqāṣid Sharīa. As for some previous research from cluster I including:

1. Thesis with the title “Zina Menurut Hukum Positif Indonesia (Analisis Terhadap Pasal 284 KUHP Ditinjau Menurut Hukum Islam),” written by Kamaluddin Tamusai NST in 2021. This researcher discusses adultery (*zina*) in article 284 of the Penal Code. Although both discuss about adultery (*zina*), in this study, the legal material used is the former Penal

Code which, in fact, is a translation of the *WvS (Wetboek van Strafrecht)*, then linked to its relevance to Islamic Law.

2. Thesis with the title “Sanksi Zina (Studi Komparatif Antara Hukum Pidana Islam dan KUHP),” written by Nurul Islam in 2019. This researcher discusses about adultery (*zina*) in the Penal Code and Islamic Criminal Law. Although both discuss adultery (*zina*), this research focuses more on comparing sanctions for the act of adultery from the point of view of the Penal Code and Islamic Criminal Law. This research also uses primary legal materials in the form of the former Penal Code, which is a translation of the *WvS (Wetboek van Strafrecht)*.
3. Thesis with the title “Hukuman Pelaku Zina Dewasa Dengan Anak (Perbandingan Fiqh Jinayah dan Qanun No. 6 Tahun 2014 tentang Hukum Jinayat),” written by Ida Noverayanti in 2017. This researcher discusses about sanctions for adults who commit adultery (*zina*) with underage children. Although both discuss about adultery (*zina*), the focus of this research is a comparison of sanctions against adulterers in *Fiqh Jinayah* and Qanun Number 6 of 2014 concerning *Jinayat* Law.
4. Thesis with the title “Zina di dalam Alquran (Metode Analisis Tafsir Fī Zilāl Al-Qur‘ān),” written by Hafas Ali in 2019. This researcher discusses about adultery (*zina*) which is studied from the verses of the Qur‘an using Sayyid Quṭb’s interpretation. Although both discuss about adultery (*zina*), the points discussed by this researcher are the opinions of scholars about: a) the punishment of adulterers; b) the law of

marrying adulterers; c) the status of children from adultery and this researcher also discuss Sayyid Quṭb's interpretation of adultery (*zina*) verses in Tafsir Fī Zilāl Al-Qur'ān.

To simplify and make it easier for readers to read and understand some of the differences and similarities between this research and previous studies, the authors will also present tables of the results of previous studies.

### Previous Research (Cluster I)

No	Name	Thesis title	Equality	Difference
1.	Kamaluddin Tamusai NST (Islamic State University of Sultan Syarif Kasim Riau)	Zina Menurut Hukum Positif Indonesia (Analisis Terhadap Pasal 284 KUHP Ditinjau Menurut Hukum Islam)	The topics discussed were equally about adultery	Examine the regulation on adultery ( <i>zina</i> ) in the former Penal Code Article 284 from the perspective of Islamic Law
2.	Nurul Islam (Islamic State University Mataram)	Sanksi Zina (Studi Komparatif Antara Hukum Pidana Islam dan KUHP)	The topics discussed were equally about adultery	More focused on sanctions for adultery, the primary legal material used is the former Penal Code
3.	Ida Noverayanti (Islamic State University of Ar-Raniry Darussalam)	Hukuman Pelaku Zina Dewasa Dengan Anak (Perbandingan Fiqh Jinayah dan Qanun No. 6 Tahun 2014 tentang Hukum Jinayat)	The topics discussed were equally about adultery	More focused on the comparison of sanctions against adult adulterers who commit adultery with underage children in <i>Fiqh Jinayat</i> and Qanun Number 6 of 2014 concerning <i>Jinayat</i> Law
4.	Hafas Ali (Islamic State University of Sultan Maulana Hasanuddin Banten)	Zina di dalam Alquran (Metode Analisis Tafsir Fī Zilāl Al-Qur'ān)	The topics discussed were equally about adultery	Examining adultery in the Qur'an using Sayyid Quṭb's interpretation

Through the presentation of the table, it can be found and concluded several points of difference and similarity between previous research and the author's research which has a similar theme or topic. Although the object studied is the same as adultery, the perspective used in studying the object is different between one research and another.

And then, here are some previous studies from cluster II which contain topics or themes about Jasser Auda's *Maqāshid Sharīa* including:

1. The journal article entitled “*Putusan Open Legal Policy Ketentuan Tindak Pidana Zina Perspektif Maqashid Syariah,*” was written by Amiruddin Hasan and Abid Rohmanu in 2022. This research discusses about the analysis of the argumentation of judges' considerations related to family resilience in the Constitutional Court Decision No. 46/PUU-XIV/2016. In analyzing the object of study, this research uses the concept of Jasser Auda's *Maqāshid Sharīa* as an analytical knife. Although both use the perspective of Jasser Auda's *Maqāshid Sharīa* in studying an object of study, the object of study is different. The object of study in this research is the argumentation of judges' considerations related to family resilience in Constitutional Court Decision No. 46/PUU-XIV/2016.
2. The journal article entitled “*Pertimbangan Mahkamah Konstitusi Terhadap Putusan Nomor 22/Puu-Xv/2017 Tentang Batas Usia Minimal Menikah bagi Perempuan Perspektif Maqāshid Sharī'ah Jasser*

Auda,” written by Achmad Fauzan in 2019. This study discusses the legal considerations of judges on the judicial review decision on Article 7 Paragraphs (1) and (2) of Law Number 1 of 1974 concerning Marriage submitted by the applicant who is a victim of underage marriage (less than 16 years old). The main issue used as the reason by the applicants is the article of Article 7 Paragraphs (1) and (2) of Law No.1 of 1974 concerning Marriage, which is considered to contain discrimination against women and is not in accordance with the 1945 Constitution so that the marriage age deserves to be raised. The Constitutional Court accepted the request with Constitutional Court Decision Number 22/PUU-XV/2017. Then, the legal considerations of the Decision are analyzed from the perspective of Jasser Auda's Maqāṣid Sharīa.

3. The journal article entitled “On The Legal Sanction Against Marriage Registration Violation in Southeast Asia Countries: A Jasser Auda's Maqasid Al-Shariah Perspective,” written by M. Noor Harisudin and Muhammad Choriri. This research discusses legal sanctions for marriage registration violations in three Southeast Asian countries: 1) Malaysia; 2) Brunei Darussalam; 3) Indonesia. This study investigates the diversity of regulations on violations of marriage registration in these countries. It analyzes how Jasser Auda's Maqāṣid Sharīa perspective views the types of legal sanctions in these three countries. To simplify and make it easier for readers to read and understand some



of the differences and similarities between this research and previous studies, the authors will also present tables of the results of previous studies.

### Previous Research (Cluster II)

No	Name	Thesis title	Equality	Difference
1.	Amiruddin Hasan, Abid Rohmanu (State Institute for Islamic Studies of Ponorogo)	Putusan <i>Open Legal Policy</i> Ketentuan Tindak Pidana Zina Perspektif <i>Maqashid Syariah</i>	The approach used in reviewing or studying the object of study is the Maqāṣid Sharīa concept.	The object of study in this research is the argumentation of judges' considerations related to family resilience in Constitutional Court Decision No. 46/PUU-XIV/2016.
2.	Achmad Fauzan (Islamic State University of Walisongo Semarang)	Pertimbangan Mahkamah Konstitusi Terhadap Putusan Nomor 22/Puu-Xv/2017 Tentang Batas Usia Minimal Menikah bagi Perempuan Perspektif Maqāṣid Sharī'ah Jasser Auda	The approach used in reviewing or studying the object of study is the Maqāṣid Sharīa concept.	The object of study in this research is the Consideration of the Constitutional Court (Mahkamah Konstitusi) on Decision Number 22/Puu-Xv/2017 Concerning the Minimum Age of Marriage for Women.
3.	M. Noor Harisudin, Muhammad Choriri (Islamic State University of KH. Achmad Shidiq)	On The Legal Sanction Against Marriage Registration Violation in Southeast Asia Countries: A Jasser Auda's Maqasid Al-Shariah Perspective	The approach used in reviewing or studying the object of study is the Maqāṣid Sharīa concept.	The object of study in this research is the legal sanctions for marriage registration violations in three Southeast Asian countries: 1) Malaysia; 2) Brunei Darussalam; 3) Indonesia.

Through the presentation of the table, it can be found and concluded several points of difference and similarity between previous research and the author's research, namely in examining or studying an object of study using the approach of the *maqāṣid sharīa* concept. Although the approach in studying an object is the same, namely both using the *maqāṣid sharīa* concept, the object of study studied is different between one study and another.

#### **H. Structure of Discussion**

The structure of discussion in this research is divided into four chapters. Each chapter is interrelated or interconnected with each other, starting from Chapter I (introduction), then Chapter II (literature review), then Chapter III (results and discussion), the last is Chapter IV (closing):

**CHAPTER I:** This Chapter is an introduction that contains the background of the problem. The reasons why this research was conducted are explained in this background section, which is about the renewal of the Penal Code, which in fact, is a Dutch colonial legacy, into a National Penal Code that is adapted to the conditions of the Indonesian national character. Unfortunately, there are polemics related to several articles in the National Penal Code. Including the article on adultery (*zina*), there are support and disapproval of the article on adultery.

After that, determine the statement of the problem and its research purposes

in this study. Then, write the benefits obtained from the results of this research. Chapter I also explains the research methods used in this research, both related to the type of research, research approach, legal materials, methods of collecting data, and data processing methods in this research. This chapter also describes previous research related to this research. In this matter, the researcher describes studies that have similarities in theme but have differences in each study. Finally, this chapter also explains the structure of the discussion in this research.

**CHAPTER II:** The theories used in this study will be presented in Chapter II, which include adultery in Islamic law and the National Penal Code, both related to the definition of adultery, elements of adultery, and sanctions for adultery. It will also explain about Jasser Auda's Maqāṣid Sharīa, both related to Jasser Auda's biography, the meaning of Maqāṣid Sharīa, the system approach in Maqāṣid Sharīa, and the Reorientation of the Classical Maqāṣid Sharīa Concept Toward Contemporary Maqāṣid Sharīa Concept.

**CHAPTER III:** The analysis process is carried out by researchers. It will then produce research results to answer the problem formulation in this study. In this chapter, the results of the research produced by the researcher will be presented.

**CHAPTER IV:** Conclusions from the results of the researcher's analysis presented in Chapter III will be written in Chapter IV. In addition, the researcher's suggestions in this study will also be written in this chapter.

## CHAPTER II

### LITERATURE REVIEW

#### A. Adultery (*zina*) in Islamic Law

##### 1. Meaning of Adultery

Adultery etymologically means *fāḥisyah* (in Arabic: فَاحِشَةٌ), which is a shameful deed. Meanwhile, in terminology, it is intercourse like husband and wife committed by a man and a woman without a marriage relationship.<sup>25</sup>

The views of the scholars (*fuqaha*) are as follows:

*Ash-Shāfi'iyyah* defined adultery as the intentional entry of a man's penis or part of it into the vagina of a non-mahram woman outside of a doubtful (*syubhat*) matter.<sup>26</sup>

*Al-Mālikīyah* defined adultery as sexual intercourse by a Muslim who is a *mukalaf* on the private parts of a woman (vagina) who does not belong to him (not his wife or slave) without doubt or intentional.<sup>27</sup>

*Al-Hanafīyah* stated that adultery is the name for unlawful (*haram*) intercourse in the genitals (*qubul*) of a woman who is alive in a condition of free will (*ikhtiyar*) in a fair country, committed by a person to whom Islamic law applies, and the woman does not belong

---

<sup>25</sup> Fitri Wahyuni, *Hukum Pidana Islam (Aktualisasi Nilai-Nilai Hukum Pidana Islam Dalam Pembaharuan Hukum Pidana Indonesia)*, (Tangerang: PT Nusantara Persada Utama, 2018), 39.

<sup>26</sup> Abu Mazaya Al-Hafiz & Abu Izzat Al-Sahafi, *Fiqh Jenayah Islam*, (Kuala Lumpur: Al-Hidayah Publication, 2003), 263.

<sup>27</sup> Abu Mazaya Al-Hafiz & Abu Izzat Al-Sahafi, *Fiqh Jenayah Islam ...*, 262.

to him, and there is no doubt (*syubhat*) in his own.<sup>28</sup>

*Al-Hanābilah* is of the view that adultery is the committing of a shameful deed (copulation), either of the genitals (*qubul*) or the anus (*dubur*).<sup>29</sup>

In general, from the above views, it can be defined that adultery is sexual intercourse between a man and a woman who are not bound by a marital relationship between the both of them.

## 2. Elements of Adultery

The elements of *jarimah zina* (adultery offense) that can be known from several definitions expressed by these scholars (*fuqaha*) are two, namely:

First, **forbidden intercourse**. Sexual intercourse in the *farji* (genitals) is intercourse that is regarded as *zina* (adultery). Intercourse here refers to the entry of the male genitalia into the female genitalia, even if only slightly, either with or without a barrier between the male genitalia and the female genitalia, as long as the barrier is thin and does not hinder the feeling and pleasure of intercourse.

Second, there is **unlawful intent or willfulness**. This element is fulfilled if the perpetrator has intercourse with a woman while he knows and is aware that the woman is forbidden for him to have intercourse with. So, if the act is done by a person intentionally, even

---

<sup>28</sup> H. Marsaid, *AL-FIQH AL-JINAYAH (Hukum Pidana Islam) Memahami Tindak Pidana Dalam Hukum Islam* (Palembang: Rafah Press, 2020), 120.

<sup>29</sup> H. Marsaid, *AL-FIQH AL-JINAYAH...*, 120-121.

though the act is forbidden, but he does not know that the act he is doing is forbidden, then he is not subject to the *hadd* punishment.

### 3. Sanction of Adultery

In Islamic law, sanctions for the criminal act of adultery are classified into two, namely, perpetrators who are not married (*ghairu muḥṣan*) or perpetrators whose status is married (*muḥṣan*).

#### a. Sanctions for perpetrators with *ghairu muḥṣan* status

##### 1) Flogging sanction

If the act of adultery is committed by a single person, then the punishment is to be flogged one hundred times. The legal basis is the *firman* of Allah Almighty in Surah an-Nur verse 2 which states that:

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ

فِي دِينِ اللَّهِ إِنَّ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيَشْهَدُ عَذَابُهُمَا طَائِفَةٌ

مِّنَ الْمُؤْمِنِينَ<sup>30</sup>

Meaning:

*Flog the adulteress and the adulterer, each one of them, with a*

<sup>30</sup> Tim Penerjemah, *Al-Qur'an dan Terjemahannya Edisi Penyempurnaan*, (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Balitbang Diklat Kemenag RI, 2019), 297.

*hundred lashes. Let no pity for them cause you to disobey God, if you truly believe in God and the Last Day; and let their punishment be witnessed by a number of believers.*<sup>31</sup> (QS. an-Nur verse 2)

The evidence from the *sunnah qauliyah* is a *hadith* as follows:

*And Yahya ibn Yahya at-Tamimi informed us, Husyaim informed us, from Manshur, from al-Hasan, from Hithan ibn Abdullah ar-Raqashi, from Ubadah ibn ash-Shamit, he said, Allah's Apostle PBUH said, "Take (law) from me, take (law) from me, Allah has made way for them (adulterous women); (adultery punishment) between a man and a woman who are single is one hundred lashes and a year's exile, whereas between a man and a woman who are married is one hundred lashes and stoning."*<sup>32</sup>

## 2) Exile sanction

The length of time of the exile sanction received by this *ghairu muḥṣan* adulterer is one year. Based on the *hadith* from Ubadah bin ash-Shamit, which has been presented above.

## b. Sanctions for perpetrators with *muḥṣan* status

### 1) Flogging sanction

Adulterers who are married are punished by flogging one hundred times based on QS. an-Nur verse 2 and also the *hadith* of the Prophet PBUH narrated by Ubadah bin ash-Shamit above.

### 2) Stoning (*rajam*) sanction

What is called *rajam* is stoning the perpetrator of adultery

<sup>31</sup> Wahiduddin Khan, *The Quran*, (New Delhi: Goodword Books, 2009), 263.

<sup>32</sup> Imam An-Nawawi, *Al-Minhaj Syarh Shahih Muslim ibn al-Hajjaj*, Terj. Thoriq Abdul Aziz At-Tamimi dan Fathoni Muhammad, "Syarah Shahih Muslim", Jilid 8, (Jakarta: Darus Sunnah Press, 2010), 361.

to death. The legal basis for this *rajam* provision is in the *hadith* of the Prophet PBUH narrated by Ubadah bin ash-Shamit above.

## **B. Adultery (*zina*) in National Penal Code**

### 1. Meaning of adultery

The National Penal Code, which was legitimized on Monday, January 2, 2023, by President Joko Widodo, is a replacement for the former Penal Code, which is a translation of the WvS (*Wetboek van Strafrecht*). In this new Penal Code (National Penal Code), in accordance with Article 411 paragraph (1), the term adultery is defined as intercourse committed by any person who is not a married couple. Thus, in this National Penal Code, there is an expansion of the meaning of the term adultery when compared to the former Penal Code, whereby in the former Penal Code, adultery was defined as intercourse committed by a man or woman who is already in a marriage relationship with a person who is not their marital partner.<sup>33</sup>

### 2. Elements of adultery

The elements of a criminal act are the conditions for determining the extent to which the actions of a human being can be subject to punishment, must be seen from the elements of a criminal act which are the conditions. The element covers human actions that fulfill the

---

<sup>33</sup> Article 284 of the Penal Code (*Wetboek van Strafrecht*).



formulation of the law and is unlawful, and in the person or perpetrator, there is guilt<sup>34</sup> in the perpetrator himself.<sup>35</sup>

To be considered as a criminal act of adultery, there must be an element of **intent** or **intentional conduct**. In the National Penal Code, the intent is always considered to exist in every criminal act under the rule of law, and this element of intent must be proven at every stage of the case inspection.<sup>36</sup>

Then, the element that must be fulfilled as a criminal act of adultery is the presence of **intercourse** (*persetubuhan*) that is unlawful. The National Penal Code does not further explain the term '*persetubuhan*' (intercourse). If taken from the Arrest Hoge Raad (decision of the Dutch Supreme Court) on February 5, 1912, the term intercourse refers to the fusion of male and female genitalia, which is usually done to have children. So, the male genitalia has to enter into the female genitalia to release sperm.<sup>37</sup> However, in the Big Indonesian Dictionary (KBBI), the word '*persetubuhan*' (intercourse) refers to '*sanggama*'. The word '*sanggama*'<sup>38</sup> in the Big Indonesian Dictionary

---

<sup>34</sup> Guilt in the study of Criminal Law is divided into two: 1) intent (*opzet*) [Read: Article 459 on Law 1/2023, Article 469 paragraph (1) on Law 1/2023]; 2) negligence (*culpa*) [Read: Article 474 paragraph (3) on Law 1/2023].

<sup>35</sup> Ahmad Bahiej, "Tinjauan Yuridis Atas Delik Perzinahan (Overspel) Dalam Hukum Pidana Di Indonesia," *SOSIO-RELIGIA*, Vol. 2, No. 2, Februari 2003: 7  
[https://www.researchgate.net/publication/315693603\\_Tinjauan\\_Yuridis\\_atas\\_Delik\\_Perzinahan\\_Overspel\\_dalam\\_Hukum\\_Pidana\\_Indonesia](https://www.researchgate.net/publication/315693603_Tinjauan_Yuridis_atas_Delik_Perzinahan_Overspel_dalam_Hukum_Pidana_Indonesia)

<sup>36</sup> Article 36 of Law Number 1 of 2023 concerning the Penal Code (National Penal Code).

<sup>37</sup> R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, (Bogor: Politeia, 1995), 209.

<sup>38</sup> KBBI Daring, *Kementerian Pendidikan, Kebudayaan, Riset, dan Teknologi Republik Indonesia*, accessed on May 8, 2023, <https://kbbi.kemdikbud.go.id/entri/sanggama>

(KBBI) means: sexual relation in the form of insertion of the penis into the vagina.

The existence of a **report** is also an element that must be fulfilled to be considered as a criminal act of adultery. The National Penal Code explains that the report can be submitted by the child/parent or husband/wife of the perpetrator of the criminal act.

### 3. Sanction of adultery

In the National Penal Code in article 411, it is explained that when a person violates the provisions of the article by fulfilling all the elements and conditions, he/she will be punished with imprisonment for a maximum of one year or a maximum fine of category II. Thus, in the National Penal Code, there is an alternative sanction in which imprisonment can be replaced by a fine. The category II fine, as contained in Article 79 of the National Penal Code, is a maximum fine in the amount of IDR 10,000,000.

## C. Maqāṣid Sharīa in Jasser Auda's Perspective

### 1. Jasser Auda's Biography

Egypt is the birthplace of Jasser Auda, in 1966.<sup>39</sup> At the Faculty of Islamic Studies at Qatar University (QFIS), Jasser Auda is an associate professor. In the Islamic Studies program, Jasser Auda's focus is on Public Policy studies. He participated in several organizations and was

---

<sup>39</sup> Royan Utsany, Afrizal Tw, and Khamim, "Women's Rights and Gender Equality: An Analysis of Jasser Auda's Thoughts and His Contribution to Renewal of Islamic Family Law in Indonesia," *Journal of Islamic Law (JIL)*, Vol. 3, No. 1, 2022: 57 <https://doi.org/10.24260/jil.v3i1.530>

even the founder it, such as the “Academic Board of the International Institute of Islamic Thought” in London; “International Institute of Advanced Systems Research (IIAS)” in Canada; “International Union of Muslim Scholar” based in Dublin; The UK’s “Board of Trustees of the Global Civilizations Study Center (GCSC)””; member of the Forum Against Islamophobia and Racism (FAIR) in the United Kingdom; member of the Executive Board of the Association of Muslim Social Scientists (AMSS) in the United Kingdom; and also the consultant for islamonline.net ([www.jasserauda.net](http://www.jasserauda.net)).<sup>40</sup>

The multi-disciplinary academic background has been owned by Jasser Auda. His doctoral degree (P.hD.) obtained by Auda from two places, i.e., the University of Waterloo, Canada in the field of System Analysis in 2006 and the University of Wales, England in the field of Islamic Legal Philosophy in 2008. From the Islamic American University Michigan in 2004, Jasser Auda obtained his master's degree (M.J.), focusing on the field of Islamic Jurisprudence on *maqāṣīdal-syarī’ah*. In 2001, Jasser Auda obtained a Bachelor of Arts degree (B.A.) from the Islamic Studies major at the Islamic American University, USA. A Bachelor of Science (B.Sc.) was obtained by Jasser Auda from Engineering Cairo University, Egypt Course Av., in 1988. He received a study of the Quran and Islamic sciences at the al-

---

<sup>40</sup> Hendri Hermawan Adinugraha, Fakhrohin, dan Mashudi, “The Reconstruction of *Maqāṣīdal-Syarī’ah* Approach In Islamic Economy: Insights From Jasser Auda Perspective,” *Social Sciences and Education Research Review*, (7) 2 206 - 224 (2020): 208 <https://sserr.ro/wp-content/uploads/2020/12/sserr-7-2-206-224.pdf>

Azhar Mosque, Cairo, Egypt.<sup>41</sup> Here is a table of explanations of higher education that have been studied:

### **Jasser Auda's Education**<sup>42</sup>

<b>Institution</b>	<b>Discipline</b>	<b>Degrees</b>	<b>Date</b>
Cairo University, Egypt	Engineering	B.Sc.	1988
Islamic American University, United State of America	Islamic Studies	B.A.	2001
Islamic American University, United State of America	Comparative Jurisprudence (Principles of Islamic Law)	M.J.	2004
University of Waterloo, Canada	Systems Analysis & Design (Classification Systems)	Ph.D.	2006
University of Wales Lampeter, United Kingdom	Theology & Religious Studies (Philosophy of Islamic Law)	Ph.D.	2008

The Maqasid Research Center in Islamic Legal Philosophy in London, United Kingdom, was founded by Jasser Auda, who is also the director. He is also a visiting lecturer for the Law faculties of Alexandria University, Egypt; the Islamic Institute of Toronto, Canada; and the Islamic Fiqh Academy, India. He lectures on Islamic Law, Philosophy, and materials related to Muslim minority issues and

<sup>41</sup> More about Jasser Auda's biography, see [www.jasserauda.net](http://www.jasserauda.net)

<sup>42</sup> Achmad Fageh, "Contextualization of Mashlahah Jasser Auda's Thought in Islamic Economy," *Indonesian Interdisciplinary Journal of Sharia Economics (IJSE)*, Vol. 4 No. 1 July 2021: 136 <https://doi.org/10.31538/ijse.v4i1.1344>

policies in several countries around the world.<sup>43</sup>

Jasser Auda is a contributor to policy reports that are with regard to Muslim minorities and Islamic education at the Ministry of Social Affairs and the Higher Education Council in the United Kingdom. He has written several books, one of which is entitled “Maqasid al-Syariah as Philosophy of Islamic Law: A Systems Approach.” In addition, he has received many awards.<sup>44</sup>

## 2. Meaning of Maqāṣid Sharīa

The term Maqāṣid Sharīa is a combination of two words, i.e., ‘Maqāṣid’ and ‘Sharīa.’ Maqāṣid is the plural form of the word maqṣid, which means purpose, objective, principle, intent, goal, end. In foreign languages, the word maqṣid means *finalité* (in French), *telos* (Greek), *Zweck* (German).<sup>45</sup> Meanwhile, sharīa means religion, *millah*, way, *sunnah*, method.<sup>46</sup>

In his book, Jasser Auda defines that sharīa is the revelation received by the Prophet Muhammad PBUH and practiced in his treatise and life mission. This means, sharīa is the Qur’an and Sunnah.<sup>47</sup> If the words ‘maqāṣid’ and ‘sharīa’ are put together, it gives an understanding that maqāṣid sharīa is the purpose, goal, end result in

---

<sup>43</sup> Samsul Hadi, “Pendekatan Multidisipliner Dalam Pengembangan Hukum Islam ( Menurut Pandangan : Jasser Auda ),” *Bintang: Jurnal Pendidikan dan Sains*, Volume 2, Nomor 3, Desember 2020: 336-337 [10.36088/bintang.v2i3.978](https://doi.org/10.36088/bintang.v2i3.978)

<sup>44</sup> More about Jasser Auda's biography, see [www.jasserauda.net](http://www.jasserauda.net)

<sup>45</sup> Jasser Auda, *Maqasid Al-Shariah As Philosophy Of Islamic Law: A Systems Approach*, (Washington: The International Institute Of Islamic Thought, 2008), 2.

<sup>46</sup> H. Abdul Helim, *MAQĀṢID AL-SHARĪ'AH versus UŞŪL AL-FIQH (Konsep dan Posisinya dalam Metodologi Hukum Islam)*, (Yogyakarta: Pustaka Pelajar, 2019), 8.

<sup>47</sup> Jasser Auda, *Maqasid Al-Shariah As Philosophy Of Islamic Law: A Systems Approach*, (Washington: The International Institute Of Islamic Thought, 2008), 2.

the form of ultimate benefit (*kemaslahatan hakiki*) with the establishment of law on humans.<sup>48</sup> Cited from Ibn ‘Ashur, Jasser Auda, in his book, states that *maqāṣid sharīa* are the objectives/purposes behind the law.<sup>49</sup>

### 3. A Systems Approach in *Maqāṣid Sharīa*

#### a. Cognitive Nature of the Islamic Law System

Islamic law (*fiqh*) is a hypothesis resulting from the cognitive construction of jurists “*fi al-dhin al-faqih*.” Reasoning and *ijtihad* are required by *fiqh* experts who try to uncover the hidden meaning or practical implications of the *sharī’a* in the Qur’an and hadith.<sup>50</sup> So, *fiqh* is part of human cognition (*idrak*) and understanding (*fahm*). To borrow from Ibn Taymiyyah, *fiqh* law is the understanding or cognitive form of religious experts or *fuqaha*. Thus, weaknesses and shortcomings are very likely to be owned by *fiqh*. Matters related to issues like this, in the treasures of contemporary philosophy of science, are known as 'the fallibility' or 'the corrigibility of knowledge' (any science, including religious scientific conceptions and theories compiled by clever scholars [*fuqaha/ulama*], can possibly experience inaccuracies and errors). As a consequence, the understanding of *fiqh* in a particular era and

---

<sup>48</sup> H. Abdul Helim, *MAQĀṢID AL-SHARĪ’AH versus UṢŪL AL-FIQH (Konsep dan Posisinya dalam Metodologi Hukum Islam)*, (Yogyakarta: Pustaka Pelajar, 2019), 9.

<sup>49</sup> Jasser Auda, *Maqasid Al-Shariah As Philosophy Of Islamic Law: A Systems Approach*, (Washington: The International Institute Of Islamic Thought, 2008), 2.

<sup>50</sup> Abdurrahman Misno BP, *Panorama Maqashid Syariah*, (Bandung: Penerbit Media Sains Indonesia, 2021), 165.

the level of human educational attainment in a particular era as well as the development of science in a particular era, can be debated and can be changed in the right and better direction. Thus, *fiqh* is a person's perception and interpretation that is subjective in nature, both individually and in groups, factions, madhhabs (*mazhab*), socio-religious organizations, and so on. Unfortunately, the *ijtihad* method of *fiqh* and its results are often perceived as 'God's rules', which cannot be contested.<sup>51</sup>

b. Wholeness of the Islamic Law System

In regard to 'wholeness' that between the various components have a relationship with each other. Jasser Auda considers that in analyzing and studying a problem in *fiqh*, Islamic jurists tend to be reductionistic and atomistic. Jasser Auda also offers a holistic perspective in applying the framework in *fiqh*. According to Auda's view, maqāṣid sharīa should also be universal and no longer only have an individual dimension. This is so that it can be accepted by a wide audience.<sup>52</sup>

c. Openness of the System of Islamic Law

---

<sup>51</sup> Muhammad Habib Adi Putra, Umi Sumbulah, "Memaknai Kembali Konsep Nusyuz Dalam Kompilasi Hukum Islam Perspektif Gender & Maqashid Syariah Jasser Auda," *EGALITA: Jurnal Kesetaraan dan Keadilan Gender*, Volume 15, No 1, Tahun 2020: 47 <https://doi.org/10.18860/egalita.v15i1.10179>

<sup>52</sup> Dedisyah Putra, Asrul Hamid, dan Martua Nasution, "Metodelogi Maqashid Al-Syari'ah Jasser Auda Sebagai Pendekatan Baru Sistem Hukum Islam", *AL-SYAKHSHIYYAH: Jurnal Hukum Keluarga Islam dan Kemanusiaan*, Vol. 4; No. 1; Juni 2022: 94 <http://dx.doi.org/10.35673/as-hki.v4i1.2427>

The Islamic law system is an ‘open’ system. Some *faqih* still insists that at the level of Ushul Fiqh theory, the gate of *ijtihad* is closed. This would make Islamic law a ‘closed system’, and ultimately make Islamic law metaphorically ‘dead.’ However, the majority of *faqih* and all popular schools of *fiqh* over the centuries agree that it is a necessity for Islamic law to undertake *ijtihad*. This is because specific texts (*nas*) are limited, while events are unlimited.<sup>53</sup>

d. Interrelated Hierarchy of the System of Islamic Law

Maqāṣid Sharīa as formulated by classical scholars such as al-Syatibi, for example, there are hierarchies or levels of the most basic maqāṣid namely *dzaruriyat*, *hajiyyat*, and *tahsiniyat*, but in essence between the three are interconnected and related to each other.<sup>54</sup>

e. Multi-Dimensionality of the System of Islamic Law

A system is a unity of various interrelated subsystems. Islamic law is a system, so multidimensional thinking is needed in doing *ijtihad* to determine Islamic law. In this regard, Jasser Auda criticizes the scholars (*ulama*) of *ushul* and classical *fiqh* scholars (*ulama*) who tend to think in only one or two dimensions. For example, seeing everything only on sides of white and black, metaphysical and physical, specific and universal, and so on. For

---

<sup>53</sup> Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Syariah*, terj. Rosidin dan Ali Abd el-Mun'in, (Bandung: PT Mizan Pustaka, 2015), 88.

<sup>54</sup> Abdurrahman Misno BP, *Panorama Maqashid...*, 167.



example, in *ta'arud al-dalalah*, sometimes there are those who think there are contradictions in the verses in the Qur'an.<sup>55</sup>

Whereas if applying 'multidimensional thinking,' the contradiction of verses in the Qur'an cannot exist. Human understanding, which is limited to one or two aspects only, causes when understanding the verse to feel there are contradictions.<sup>56</sup>

f. Purposefulness of the System of Islamic Law

Purpose or goal-oriented becomes something that is most core in a system. This is because a system is formed in order to achieve certain purposes, as well as Islamic law. In this matter, *maqāsid*, or the purpose of the emergence of an Islamic law is the core of Islamic law itself. The purposefulness of Islamic law covers the five features of the Islamic legal system above, i.e., cognitive nature, wholeness, openness, interrelated hierarchy, and multi-dimensionality.<sup>57</sup>

So, the features in the system approach are interrelated with each other, with purposefulness feature as the core. Therefore, these features are arranged in order to achieve the purpose.

#### 4. Reorientation of the Classical *Maqāsid Sharīa* Concept Toward Contemporary *Maqāsid Sharīa* Concept

---

<sup>55</sup> Abdurrahman Misno BP, *Panorama Maqashid...*, 168.

<sup>56</sup> Abdurrahman Misno BP, *Panorama Maqashid...*, 168.

<sup>57</sup> Abdurrahman Misno BP, *Panorama Maqashid...*, 168.

According to Jasser Auda, in the reorientation of classical maqāsid sharīa toward contemporary maqāsid sharīa, there is a change from maqāsid sharīa which is nuanced ‘protection’ and ‘preservation’ toward maqāsid sharīa which is nuanced ‘development’ and breeding ‘human rights’.<sup>58</sup>

In contemporary maqāsid sharīa theory, the conceptions of maqāsid develop and transform in a direction that is more in line with current issues than classical conceptions. For example, the concept of *hifz nasl*, which means ‘preservation of offspring’, has been transformed into ‘caring for the family’; ‘the existence of a civilized Islamic social system’. The concept of *hifz ‘aql*, which means ‘preservation of the mind’, has also been transformed into ‘the journey of studying’; ‘developing scientific thought’; ‘suppressing the herd mentality’; ‘avoiding the immigration of experts go abroad’. The concept of *hifz ‘ird* which means ‘preservation of honor’, also transforms into ‘safeguarding human rights’; ‘preservation of human dignity’. The concept of *hifz din* which is the ‘preservation of religion’, also transforms into ‘freedom of faith’ in contemporary expressions. The concept of *hifz mal* which is the ‘preservation of wealth’, also transforms into ‘minimizing the gap between classes’; ‘economic development’.<sup>59</sup>

---

<sup>58</sup> Jasser Auda, *Membumikan Hukum Islam ...*, 11.

<sup>59</sup> Jasser Auda, *Maqasid Al-Shariah As Philosophy Of Islamic Law: A Systems Approach*, (Washington: The International Institute Of Islamic Thought), 248-249.

The following table compares the concept of classical maqāsid sharīa to the concept of contemporary maqāsid sharīa:

### Comparison of Classical Concepts To Contemporary Concepts

Classical Concepts	Contemporary Concepts
<i>Hifz nasl</i> (preservation of offspring)	Caring for the family; the existence of a civilized Islamic social system
<i>Hifz 'aql</i> (preservation of the mind)	The journey of studying; developing scientific thought; suppressing the herd mentality; avoiding the immigration of experts go abroad
<i>Hifz 'ird</i> (preservation of honor)	Safeguarding human rights; preservation of human dignity
<i>Hifz mal</i> (preservation of wealth)	Minimizing the gap between classes; economic development
<i>Hifz din</i> (preservation of religion)	Freedom of faith

## **CHAPTER III**

### **RESULTS AND DISCUSSION**

#### **A. Philosophical, Sociological, and Juridical Foundation as the Urgency of National Penal Code (KUHP) Reform**

Quoting from the Academic Paper Draft of Draft Bill on the Penal Code (NA RUU KUHP), in chapter 4, it is explained that the reasons for the need to establish a new National Penal Code are contained in: 1) philosophical foundation; 2) sociological foundation, and; 3) juridical foundation. Of course, besides these reasons, the establishment of the new National Penal Code also takes into account the following: (1) the perception on life and awareness and the ideals of law originate from Pancasila and the Preamble of the 1945 Constitution of the Republic of Indonesia, (2) paying attention to the fulfillment of the needs of the law of society and the state related to the empirical facts of the development of national criminal law, and (3) paying attention to rules that already exist so that they will have an impact on the material or substance to be regulated. Then, the following will describe the reasons why the establishment of a new National Penal Code is needed.

##### **1. Philosophical Foundation**

Attempts to reform criminal law in Indonesia must be based on the national goals to be achieved by the Indonesian nation as a sovereign and independent state. Because the Penal Code is a legal product of the Dutch East Indies colonial heritage that is still applicable, it needs to be

adjusted. Furthermore, criminal law reform must be a means to safeguard the entire Indonesian nation and the entire homeland of Indonesia, improve public welfare, intellectualize the nation's life, and contribute in implementing the global order based on freedom, eternal peace, and also social justice. Therefore, the implementation of the reform must be based on the Preamble of the 1945 Constitution of the Republic of Indonesia, which is in the fourth paragraph.

In relation to the material of the national criminal law, it must adjust to the situation and also reflect the values of the “typical of the Indonesian nation.” So, it must adjust to the situation, legal politics, and the development of the life of the nation and state, which aims to uphold and respect human rights. And also create a balance based on “pancasila,” i.e. God Almighty, which is a religious moral value, humanity, nationality, populism, and social justice for all Indonesian people.

Criminal law and criminal procedure law want to achieve two purposes in relation to criminal law reform, namely outward and inward purposes. To contribute to creating world order in connection with the development of international crimes is the outward purpose. Meanwhile, the inward purpose is that criminal law reform is carried out as a means for the welfare of society and the protection of Indonesian society, both of which are the cornerstones of criminal

law.<sup>60</sup>

## 2. Sociological Foundation

The desire to fulfill the needs of society toward the law is the reason why the reform of the law is carried out. This has been pursued since 46 years ago (if referring to the year the NA RUU KUHP 2015 was drafted), but if in the context until the enactment of the National Penal Code through Law Number 1 of 2023 concerning the Penal Code (KUHP), this means that it has been pursued since  $\pm$  53 years ago. The cultural values of a freedom and sovereign nation are the basis for this need. Furthermore, Indonesia, as a country that has experienced a period of colonization, “inherited” the legal system of the colonizing country, both through jurisprudence, the principle of concordance (asas konkordansi), and the doctrine instilled by the colonizers. As a result, in later developments, the country's legal system was not widely understood by the new generation in the colonized country (such as Indonesia). Therefore, law reform must be carried out in order to realize national criminal law.

The strong demand for legal certainty and justice, as well as the rapid development of Indonesian society in line with international developments, has caused several formulations of criminal law contained in the Penal Code (KUHP) to no longer be used as a legal basis to overcome the problem of crime. Therefore, a comprehensive

---

<sup>60</sup> Read: Academic Paper Draft of Draft Bill on the Penal Code (NA RUU KUHP). Can be downloaded at [https://bphn.go.id/data/documents/naskah\\_akademik\\_tentang\\_kuhp\\_dengan\\_lampiran.pdf](https://bphn.go.id/data/documents/naskah_akademik_tentang_kuhp_dengan_lampiran.pdf)

criminal law must be realized as soon as possible through criminal law reform, which regulates the balance between the public interest and the interests of the state with individual interests, between the elements of action and mental attitude, between the protection of victims of criminal acts and perpetrators of criminal acts, between written law and laws that live in society, between justice and legal certainty, between human rights and human obligations, and between national values and universal values.

This is a manifestation of the decolonization mission of the Kitab Undang-Undang Hukum Pidana (KUHP)/Penal Code, which is a colonial legacy, consolidation of criminal law, the democratization of criminal law, as well as adaptation and harmonization of various legal developments that occur both as a result of developments in the field of criminal law science and the development of values, standards and norms that live and develop in the life of Indonesian legal society and the international world, as well as a reflection of responsible national sovereignty (privilege, control, and responsibility).<sup>61</sup>

### 3. Juridical Foundation

The *Wetboek van Strafrecht voor Nederlandsch-Indie* is the origin of the Penal Code (KUHP) in Indonesia. Its enactment was based on Article II of the Transitional Rules (Aturan Peralihan) of the 1945 Constitution. In Indonesia, the dualism of criminal law still occurred

---

<sup>61</sup> Read: Academic Paper Draft of Draft Bill on the Penal Code (NA RUU KUHP). Can be downloaded at [https://bphn.go.id/data/documents/naskah\\_akademik\\_tentang\\_kuhp\\_dengan\\_lampiran.pdf](https://bphn.go.id/data/documents/naskah_akademik_tentang_kuhp_dengan_lampiran.pdf)

until 1958. Then, after the enactment of Law Number 73 of 1958 concerning “Declaring the Enactment of Law Number 1 of 1946 of the Republic of Indonesia Concerning Criminal Law Regulations for the Entire Territory of the Republic of Indonesia and Amending the Kitab Undang-Undang Hukum Pidana (KUHP)/Penal Code,” the unity of uniform material criminal law for all of Indonesia was realized. This was based on the *Wetboek van Strafrecht voor Nederlandsch-Indie*, later referred to as the KUHP.

Indonesia has made many attempts to adjust the Penal Code (KUHP). This is intended to adapt the KUHP, which is a “colonial heritage,” to the sovereignty of Indonesia and to other developments in social life, both nationally and internationally. The following are some of the reforms and/or amendments that have been made to the Penal Code (KUHP): Law Number 1 of 1960 concerning Amendments to the Kitab Undang-Undang Hukum Pidana (KUHP)/Penal Code; Law Number 16 Prp. of 1960 concerning Several Amendments to the Kitab Undang-Undang Hukum Pidana (KUHP)/Penal Code; Law No. 18 of Prp of 1960 concerning Amendments to the Amount of Fines in the Kitab Undang-Undang Hukum Pidana (KUHP)/Penal Code and in Other Criminal Provisions Issued Prior to August 17, 1945; Law Number 2 of PNPS of 1964 concerning Procedures for the Implementation of Capital Punishment Imposed by Courts in the Environment of General and Military Courts; Law Number 1 of PNPS



of 1965 concerning Prevention of Abuse or Blasphemy of Religion; Law Number 7 of 1974 concerning Gambling Control; Law Number 4 of 1976 concerning Amendments and Additions to Several Articles in the Kitab Undang-Undang Hukum Pidana (KUHP)/Penal Code Relating to the Expansion of the Applicability of Criminal Legislation Provisions, Aviation Crimes, and Crimes Against Aviation Facilities/Property; Law Number 27 of 1999 concerning Amendments to the Kitab Undang-Undang Hukum Pidana (KUHP)/Penal Code Relating to Crimes Against State Security; Law Number 3 of 1971 which was later replaced by Law Number 31 of 1999 Jo. Law Number 20 of 2001, concerning the Eradication of Corruption.

From the reforms and/or amendments that have been made, if examined, it has an evolutionary nuance and still has a temporary (*ad hoc*) nature. Thus, the replacement of the Penal Code (*Wetboek van Strafrecht*), which is a colonial heritage into the National Penal Code (KUHP Nasional), needs to be carried out. This is intended so that fundamental, comprehensive, and systemic reforms and/or amendments can be realized. Thus, the drafting of the National Penal Code (KUHP Nasional) is required.<sup>62</sup>

---

<sup>62</sup> Read: Academic Paper Draft of Draft Bill on the Penal Code (NA RUU KUHP). Can be downloaded at [https://bphn.go.id/data/documents/naskah\\_akademik\\_tentang\\_kuhp\\_dengan\\_lampiran.pdf](https://bphn.go.id/data/documents/naskah_akademik_tentang_kuhp_dengan_lampiran.pdf)

## **B. The Urgency of National Penal Code (KUHP) Reform Related to the *Delict of Adultery***

Criminal law reform in Indonesia needs to be carried out because the Penal Code in Indonesia is the Dutch *Wvs* (*Wetboek van Strafrecht*) which applies in Indonesia through the principle of concordance (*asas konkordansi*) on January 1, 1918. If calculated until the ratification of the new National Penal Code, the *Wvs* is around 104 years old. This means that the *Wvs* require changes because it is no longer relevant to the current condition of Indonesian society. And also, because the *Wvs* is a Dutch colonial heritage, it has a soul that is different from the soul of Indonesian society. The Penal Code (KUHP) of the Dutch heritage is characterized by its individualism and liberalism. Meanwhile, the Indonesian culture upholds social values<sup>63</sup> and religious values.

For example, in the former Penal Code (article 284), adultery (*zinah*) (in *Wvs* is '*overspel*') is defined by R. Soesilo as sexual intercourse committed by a married man or woman with a woman or man who is not their wife or husband.<sup>64</sup> From this definition, adultery is an 'affair' and a violation of marital fidelity. This is different from the definition of adultery (*zina*) that exists in society. From society's point of view, adultery is an extra-marital relationship (sexual intercourse) committed by any person, whether they are

---

<sup>63</sup> Akhmad Khalimy, "Makna Aturan Peralihan Sebagai Politik Hukum RUU KUHP (Transformasi Dari Hukum Kolonial Ke Hukum Nasional)," *Jurnal Hukum Progresif*, Vol. 8, No. 2, Oktober 2020: 124 <https://doi.org/10.14710/jhp.8.2.121-136>

<sup>64</sup> R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, (Bogor: Politeia, 1976), 209.

already in a marital relationship or not in a marital relationship.<sup>65</sup> Sahetapy, on the other hand, has a view that is in line with society. He states that unlawful intercourse means not only intercourse committed by a man or woman who is still bound by marriage, but also intercourse committed by a man and woman who are not yet bound by marriage, even though they are engaged.<sup>66</sup> Thus, the term ‘zina’ in the Penal Code (*Wetboek van Strafrecht*) is not the same as the term ‘zina’ in society. Adultery in the Penal Code is viewed as a violation of marital fidelity. Meanwhile, in society, it is a violation of religious values, decency, and modesty.

Indonesia, as a nation that embraces Pancasila's ideology, must consider that Pancasila is a “way of life” in which every activity of life must be reflected in the values of Pancasila. The first principle of Pancasila, which reads: “Ketuhanan Yang Maha Esa<sup>67</sup>.”

It means that religious values must be accommodated in the life of Indonesian society. Recognized religions in Indonesia prohibit adultery. As in Islam through Surah al-Isra verse 32:

وَلَا تَقْرُبُوا الزَّوْجَ إِتْنَهُ ۖ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا<sup>68</sup>

<sup>65</sup> Pahrur Rizal, “Reformulasi Tindak Pidana Perzinahan dalam Sistem Hukum Pidana Indonesia,” *JATISWARA Jurnal Ilmu Hukum*, Vol. 32 No.1, Maret 2017: 131 <http://jatiswara.unram.ac.id/index.php/js/article/view/75/71>

<sup>66</sup> Sahetapy dan B. Mardjono Reksodiputro. *Parados dalam Kriminologi*, (Jakarta: Rajawali, 1989), 62.

<sup>67</sup> Free translation: “Belief in God Almighty”

<sup>68</sup> Tim Penerjemah, *Al-Qur'an dan Terjemahannya Edisi Penyempurnaan*, (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Balitbang Diklat Kemenag RI, 2019), 397.

Meaning:

*And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.*<sup>69</sup> (QS. al-Isra verse 32)

The Gospel, as a guide for Christians, also prohibits adultery through Matthew Chapter 5, verses 27 to 28:

(27) *You have heard that it was said to those of old, ‘You shall not commit adultery.’* (28) *“But I say to you that whoever looks at a woman to lust for her has already committed adultery with her in his heart.”*<sup>70</sup>  
(Matthew 5:27-28)

As for Hinduism, the prohibition of adultery is in the Veda Smerti, Manawa Dharmasastra III. 63<sup>71</sup>:

***Kuwiwahaih kriya lopair***

***wedanadhyayanena ca***

***kulanya kulam tamyanti***

***brahmanati kramena ca.***

***(Veda Smerti, Manawa Dharmasastra III. 63)***

Meaning:

---

<sup>69</sup> Saheeh International, *The Qur'an English Meanings*, (Jeddah: Al-Muntada Al-Islami, 2004), 266.

<sup>70</sup> Thomas Nelson, *The Holy Bible, New King James Version*, (Nashville: Thomas Nelson Publishers, 1982), 850.

<sup>71</sup> Desak Ayu Gangga, Evander, dan Joshua Giorgio, “Kontroversi Perzinahan di Mata Agama Dan Hukum Yang Berlaku Di Indonesia Dengan Fakta Lapangan,” *Jurnal Supremasi*, Volume 10, Nomor 1, Maret 2020: 49 <https://doi.org/10.35457/supremasi.v10i1.862>

“By having lowly sex outside the marriage methods (*brahmana wiwaha*, *prajapati wiwaha* and *daiwa wiwaha*), by ignoring the *pawiwahan* ceremony, by ignoring the *weda*, with despicable behavior, not paying attention to the advice of *Sulinggih* (*Brahmana*, holy people) then large, rich and influential families will fall apart.”

Buddhism also prohibits adultery, although it does not include sanctions for violators. There is a belief in Buddhism that if people do not behave according to the rules, then *Dukkha* or suffering will be received by that person.<sup>72</sup> Adultery in Buddhism is included in the grouping of “Ten Bad *Kamma*” and is also included in the grouping of bad deeds called *Kammakilesa*. There are four kinds of actions included in *Kammakilesa*, one of which is *Kamesu-Micchacara*, which is wrongdoing related to sex. From these groupings of misdeeds, the rules of morality or “*Lima Sila*”<sup>73</sup> are made. One of them is *Kamesu-Micchacara Veramani* which means to refrain from sexual misconduct.<sup>74</sup>

Adultery from a decency (*kesusilaan*) perspective is a behavior that is not in accordance with the human conscience and makes humans feel always guilty. The root of the norm is human intuition, which works on the basis of each human being's awareness of their surroundings. God Almighty has given every human being an organ that functions as a balance sheet of consideration that always gives consideration to what humans do. Mistakes

---

<sup>72</sup> Any Ismayawati, “Konsistensi Pasal 284 KUHP Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,” *Legality*, Vol.24, No.1, Maret 2016-Agustus 2016: 94 <https://ejournal.umm.ac.id/index.php/legality/article/download/4259/4626/11069>

<sup>73</sup> Free translation: “Five Precepts”

<sup>74</sup> Any Ismayawati, “Konsistensi Pasal 284 KUHP Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945,” *Legality*, Vol.24, No.1, Maret 2016-Agustus 2016: 94 <https://ejournal.umm.ac.id/index.php/legality/article/download/4259/4626/11069>

made by humans will result in feelings of guilt and deep regret within the human being. The healthier the human being, the more effective his life will be because he always gets or obtains the consideration of a healthy conscience as well.<sup>75</sup>

Although this norm of decency is autonomous because it comes from human beings themselves, it is also public. The norm of decency as a public norm provides a broad basis of validity. This is based on the consideration that the same basis of judgment regarding the wrongness or badness of something is owned by each individual so that it is general or universal.<sup>76</sup> So the essence of decency norms is called public because it becomes a benchmark or standard related to wrong or bad behavior in society.

### **C. Provisions on the Crime of Adultery in the Former Penal Code (*Wetboek van Strafrecht*) and National Penal Code**

The National Penal Code is a replacement for the former Penal Code (*Wetboek van Strafrecht*), which is a Dutch colonial legacy. The regulation on adultery in the National Penal Code is contained in Article 411, which states that:

*(1.)Setiap Orang yang melakukan persetubuhan dengan orang yang bukan suami atau istrinya, dipidana karena perzinahan, dengan pidana penjara paling lama 1 (satu) tahun atau pidana denda paling banyak kategori II.*

---

<sup>75</sup> Pahrur Rizal, "Reformulasi Tindak Pidana Perzinahan dalam Sistem Hukum Pidana Indonesia," *JATISWARA Jurnal Ilmu Hukum*, Vol. 32 No.1, Maret 2017: 141

<http://jatiswara.unram.ac.id/index.php/js/article/view/75/71>

<sup>76</sup> Hwian Christianto, *Mengurai Kejahatan Kesusilaan Melalui Penafsiran Ekstensif dan Studi Kasus* (Yogyakarta: Suluh Media, 2017), 24.

- (2.) Terhadap Tindak Pidana sebagaimana dimaksud pada ayat (1) tidak dilakukan penuntutan kecuali atas pengaduan:
  - a.) suami atau istri lagi orang yang terikat perkawinan.
  - b.) Orang Tua atau anaknya bagi orang yang tidak terikat perkawinan.
- (3.) Terhadap pengaduan sebagaimana dimaksud pada ayat (2) tidak berlaku ketentuan sebagaimana dimaksud dalam Pasal 25, Pasal 26, dan Pasal 30.
- (4.) Pengaduan dapat ditarik kembali selama pemeriksaan di sidang pengadilan belum dimulai.

Meanwhile, the regulation on adultery in the former Penal Code (*Wetboek van Strafrecht*) is contained in Article 284, states:

- (1.) Diancam dengan pidana penjara paling lama sembilan bulan:
  - 1. a) seorang pria yang telah kawin yang melakukan gendak (*overspel*), padahal diketahui bahwa pasal 27 BW berlaku baginya,
  - b) seorang wanita yang telah kawin yang melakukan gendak, padahal diketahui bahwa pasal 27 BW berlaku baginya,
  - 2. a) seorang pria yang turut serta melakukan perbuatan itu, padahal diketahuinya bahwa yang turut bersalah telah kawin;
  - b) seorang wanita yang telah kawin yang turut serta melakukan perbuatan itu, padahal diketahui olehnya bahwa yang turut bersalah telah kawin dan pasal 27 BW berlaku baginya.
- (2.) Tidak dilakukan penuntutan melainkan atas pengaduan suami/istri yang tercemar, dan bilamana bagi mereka berlaku pasal 27 BW, dalam tenggang waktu tiga bulan diikuti dengan permintaan bercerai atau pisah-meja dan ranjang karena alasan itu juga.
- (3.) Terhadap pengaduan ini tidak berlaku pasal 72, 73, dan 75.
- (4.) Pengaduan dapat ditarik kembali selama pemeriksaan dalam sidang pengadilan belum dimulai.
- (5.) Jika bagi suami-istri berlaku pasal 27 BW, pengaduan tidak diindahkan selama perkawinan belum diputuskan karena perceraian atau sebelum putusan yang menyatakan pisah meja dan tempat tidur menjadi tetap.

Article 284 in former Penal Code contains the word '*overspel*'. The word '*overspel*'<sup>77</sup> in the "Kamus Hukum & Yurisprudensi" refers to the

<sup>77</sup> Fauzan dan Baharuddin Siagian, *Kamus Hukum & Yurisprudensi*, (Jakarta: Kencana, 2017), 530.

word '*zina*'<sup>78</sup>, which *zina* means: 1) *mukah*; 2) *persetubuhan yang dilakukan oleh seorang yang masih dalam ikatan perkawin –an dengan orang bukan istri atau suaminya (KUHPdt. Ps. 32, 209, 253, 909, KUHP 284)*<sup>79</sup>.<sup>80</sup> This means that there is a difference in the term “*zina*” (adultery) between the former Penal Code with the National Penal Code and Islamic law.

Finally, from these two regulations above (adultery article in the former Penal Code and National Penal Code), it can be seen that there is a development of the *delict* of adultery in the National Penal Code. **First**, from the law of subject (*subjek hukum*), the adultery article in the former Penal Code can be imposed if one of the perpetrators or both are married. Meanwhile, in the National Penal Code, the adultery article can be imposed even though both perpetrators are still single (unmarried). **Second**, although both regulations are absolute complaint *delict* (*delik aduan absolut*), in the National Penal Code, there are additional law of subject (*subjek hukum*) who can file a complaint. The addition is the parents or children of the perpetrator. **Third**, from the sanction, the adultery article in the National Penal Code provide more severe sanction than the former Penal Code (in former Penal Code the punishment is imprisonment for a maximum of nine months, while in National Penal Code is imprisonment for a maximum of one year or a maximum fine of category II). However, the National Penal

---

<sup>78</sup> Fauzan dan Baharuddin Siagian, *Kamus Hukum & Yurisprudensi*, (Jakarta: Kencana, 2017), 733.

<sup>79</sup> Free Translation: *zina* (adultery) means: 1) *mukah*; 2) intercourse committed by a person who is still in the marriage bond with a person who is not his wife or husband (Civil Code Art. 32, 209, 253, 909, Penal Code [*Wvs*] 284).

<sup>80</sup> Fauzan dan Baharuddin Siagian, *Kamus Hukum & Yurisprudensi*, (Jakarta: Kencana, 2017), 733.



Code also provide alternative sanctions that can be chosen, i.e., imprisonment for a maximum of one year or a maximum fine of category II (IDR 10,000,000<sup>81</sup>).

**Comparison of Development Adultery *Delict* in the Former Penal Code  
(*Wetboek van Strafrecht*) Toward the National Penal Code From  
Several Aspects**

<b>Developing Aspect</b>	<b>Former Penal Code</b>	<b>National Penal Code</b>
Law of Subject (subjek hukum) can be imposed on the adultery article	If one of the perpetrators or both are married.	This article can be imposed whether one of the perpetrators or both are married or both are unmarried.
Law of Subject (subjek hukum) who can file a complaint	Lawful spouse (wife/husband) of the perpetrator.	Lawful spouse (wife/husband) of the perpetrator or the parents/children of the perpetrator.
Sanction	Imprisonment for a maximum of nine months.	Imprisonment for a maximum of one year or a maximum fine of category II. (there are two alternative sanctions that can be chosen.)

**D. Provisions on the Crime of Adultery in the National Penal Code and Islamic Law**

Adultery is a despicable act, because it violates the norms of decency and religious norms. Adultery in Islamic law is defined as bodily relations (intercourse) committed by a man and a woman without a marriage bond

<sup>81</sup> Read: article 79 paragraph (1) in the National Penal Code.

between them. Meanwhile, the National Penal Code in article 411 paragraph (1) states that:

*Setiap Orang yang melakukan persetubuhan dengan orang yang bukan suami atau istrinya, dipidana karena perzinaan, dengan pidana penjara paling lama 1 (satu) tahun atau pidana denda paling banyak kategori II.*<sup>82</sup>

Then, the explanation of article 411 paragraph (1) is as follows<sup>83</sup>:

*Yang dimaksud dengan “bukan suami atau istrinya” adalah:*

- a. laki-laki yang berada dalam ikatan perkawinan melakukan persetubuhan dengan perempuan yang bukan istrinya;*
- b. perempuan yang berada dalam ikatan perkawinan melakukan persetubuhan dengan laki-laki yang bukan suaminya;*
- c. laki-laki yang tidak dalam ikatan perkawinan melakukan persetubuhan dengan perempuan, padahal diketahui bahwa perempuan tersebut berada dalam ikatan perkawinan;*
- d. perempuan yang tidak dalam ikatan perkawinan melakukan persetubuhan dengan laki-laki, padahal diketahui bahwa laki-laki tersebut berada dalam ikatan perkawinan; atau*
- e. laki-laki dan perempuan yang masing-masing tidak terikat dalam perkawinan melakukan persetubuhan.*

From the explanation above, a definition can be drawn regarding adultery in the National Penal Code, namely intercourse committed by a man and a woman without a marital bond between them. Thus, adultery in Islamic law and the National Penal Code have the same meaning by definition.

Adultery in Islamic law is a common *delict*. Adultery (*zina*) is a *jarimah*

---

<sup>82</sup> Free translation: *Every person who has sexual intercourse with a person who is not his/her husband or wife shall, being convicted of adultery, be punished by a maximum imprisonment of 1 (one) year or a maximum fine of category II.*

<sup>83</sup> Read the section: “Penjelasan Atas Undang-Undang Republik Indonesia Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana” in the National Penal Code.

*hudud* in Islam where the provisions regarding adultery punishment have been determined by shara' and become Allah Almighty's rights (community rights). Therefore, in Islamic law, if someone has committed adultery then that person has violated Allah Almighty's rights. Meanwhile, in the National Penal Code, adultery is an absolute complaint *delict* (delik aduan absolut) because the criminalization of adultery can only be complained by certain *rechtssubject*<sup>84</sup>. Article 411 paragraph (2) states that:

*Terhadap Tindak Pidana sebagaimana dimaksud pada ayat (1) tidak dilakukan penuntutan kecuali atas pengaduan:*

*a. suami atau istri bagi orang yang terikat perkawinan.*

*b. Orang Tua atau anaknya bagi orang yang tidak terikat perkawinan.*

From the above article, it can be understood that those who can file a complaint on the crime of adultery are: 1) the husband or wife of the criminal perpetrator of adultery; 2) the parents or children of the criminal perpetrator of adultery.

Then, the sanctions for the crime of adultery, in Islamic law, are classified into two: 1) single (*ghairu muḥṣan*); 2) already has a husband/wife (*muḥṣan*). Sanctions for adulterers who are *ghairu muḥṣan* are: 1) flogging a hundred times; 2) exile for one year. While the sanctions for adulterers who are *muḥṣan* are: 1) flogging a hundred times; 2) stoning (*rajam*). The basis for the sanction of adultery is al-Qur'an surah an-Nur verse 2:

---

<sup>84</sup> Law of subject (in English).

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ

<sup>85</sup> تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيْشَهِدَ عَذَابُهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ

Meaning:

*Flog the adulteress and the adulterer, each one of them, with a hundred lashes. Let no pity for them cause you to disobey God, if you truly believe in God and the Last Day; and let their punishment be witnessed by a number of believers.*<sup>86</sup> (QS. an-Nur verse 2)

And also, the hadith of the Prophet Muhammad PBUH, which was narrated by Ubadah bin as-Shamit:

*And Yahya ibn Yahya at-Tamimi informed us, Husyaim informed us, from Manshur, from al-Hasan, from Hithan ibn Abdullah ar-Raqashi, from Ubadah ibn ash-Shamit, he said, Allah's Apostle PBUH said, "Take (law) from me, take (law) from me, Allah has made way for them (adulterous women); (adultery punishment) between a man and a woman who are single is one hundred lashes and a year's exile, whereas between a man and a woman who are married is one hundred lashes and stoning."*<sup>87</sup>

Furthermore, the sanction of the crime of adultery in the National Penal Code is mentioned in Article 411 paragraph (1):

*Setiap Orang yang melakukan persetubuhan dengan orang yang bukan suami atau istrinya, dipidana karena perzinaan, dengan pidana penjara*

<sup>85</sup> Tim Penerjemah, *Al-Qur'an dan Terjemahannya Edisi Penyempurnaan*, (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Balitbang Diklat Kemenag RI, 2019), 297.

<sup>86</sup> Wahiduddin Khan, *The Quran*, (New Delhi: Goodword Books, 2009), 263.

<sup>87</sup> Imam An-Nawawi, *Al-Minhaj Syarh Shahih Muslim ibn al-Hajjaj*, Terj. Thoriq Abdul Aziz At-Tamimi dan Fathoni Muhammad, "Syarah Shahih Muslim", Jilid 8, (Jakarta: Darus Sunnah Press, 2010), 361.

*paling lama 1 (satu) tahun atau pidana denda paling banyak kategori II.*

So, based on the information above, there are two alternative sanctions for the criminal act of adultery, i.e., a maximum prison sanction of one year or a maximum fine of category II. The amount of category II fine as described in the National Penal Code is IDR 10,000,000<sup>88</sup>.

In a criminal incident, proof is important because, with proof, a person can be said to have committed a criminal act. From this proof, a picture of the truth of a criminal act will be obtained. Proof of adultery in Islamic law can be done by: 1) testimony; 2) confession; 3) *qarinah*; 4) *li'an* oath.<sup>89</sup> Meanwhile, the proof of adultery is basically the same as the proof of other criminal acts in positive law. This matter of proof (forms of evidence) is explained in the Criminal Procedure Code (KUHAP), i.e.<sup>90</sup>, a.) statement of the witness; b.) expert's statement; c.) letter; d.) clue; e.) defendant's statement. Then, the Law concerning Electronic Information and Transactions (UU ITE) also states:

*“Informasi Elektornik dan/atau Dokumen Elektronik dan/atau hasil cetaknya merupakan alat bukti hukum yang sah.”<sup>91</sup>,<sup>92</sup>*

This is in addition to the evidence in the Criminal Procedure Code

---

<sup>88</sup> Read: article 79 paragraph (1) in the National Penal Code

<sup>89</sup> Julia Rahmayanti Siahaan, “Sistem Pembuktian Tindak Pidana Perzinaan Dalam Perspektif Hukum Pidana Positif Dan Hukum Pidana Islam,” *AL-QANUN: Jurnal Kajian Sosial dan Hukum Islam*, Volume 1, Nomor 1, Maret 2020: 71

<https://moraref.kemenag.go.id/documents/article/99047180253355956/download>

<sup>90</sup> Article 184 paragraph (1) of the Criminal Procedure Code (KUHAP).

<sup>91</sup> Free Translation: “Electronic Information and/or Electronic Documents and/or their printouts are valid legal evidence.”

<sup>92</sup> Article 5 paragraph (1) of Law Number 11 of 2008 concerning Electronic Information and Transactions.

(KUHAP) mentioned above. So, digital evidence is valid according to this article. The following is a comparison of adultery (*zina*) in Islamic law and the National Penal Code from several aspects.

### Comparison of Adultery (*zina*) in Islamic Law and the National Penal Code From Several Aspects

Aspect	Islamic Law	National Penal Code
Definition	Bodily relations (intercourse) between a man and a woman without the existence of a marriage bond between them	Based on Article 411 paragraph (1), a definition can be drawn that the definition of adultery is intercourse committed by a man and a woman without a marriage bond between the two.
<i>Delict</i>	Common <i>delict</i> (viewed as serious sins that must be dealt with without waiting for complaint from the persons concerned) <sup>93</sup>	Absolute complaint <i>delict</i> (complaint can only be made by: 1) spouse of the perpetrator of adultery; 2) child/parents of the perpetrator of adultery.
Sanction	<i>Ghairu muḥṣan</i> adulterer: 1) one hundred lashes; 2) exile for one year. Meanwhile, <i>muḥṣan</i> adulterer: 1) one hundred lashes; 2) stoning ( <i>rajam</i> ).	There are two alternative sanctions to choose between: 1) up to a maximum imprisonment of one year or; 2) category II fine is the maximum fine (up to IDR 10,000,000).
Proving	The crime of adultery can be charged to the perpetrator if it can be proven. The proof is by:	The forms of evidence in the form of: a.) witness statement; b.) expert statement; c.) letter; d.)

<sup>93</sup> Pahrur Rizal, "Reformulasi Tindak Pidana Perzinahan dalam Sistem Hukum Pidana Indonesia," *JATISWARA Jurnal Ilmu Hukum*, Vol. 32 No.1, Maret 2017: 140  
<http://jatiswara.unram.ac.id/index.php/js/article/view/75/71>

	1) witness; confession; 3) <i>qarinah</i> ; 4) <i>li'an</i> oath.	2) clue; e.) statement of the defendant; f.) digital evidence.
--	---	--

### E. Islamic law values in the Article on Adultery in the National Penal Code

In the previous sub-chapter above, it was explained about provisions on the crime of adultery in the National Penal Code and Islamic law. So, the values of the Islamic law that can be taken from the adultery article in the National Penal Code are:

1. The definition of “*zina*” (adultery) in Islamic law and the National Penal Code is the same. It can be concluded that the definition of “*zina*” (adultery) in Islamic law and the National Penal Code is intercourse committed by a man and a woman without a marriage bond.
2. Islamic law and the National Penal Code both prohibit adultery. The prohibition of adultery in Islamic law is contained in Surah al-Isra verse 32, while the prohibition of adultery in the National Penal Code is contained in article 411 paragraph (1). However, in the National Penal Code this adultery article is an absolute complaint *delict* (delik aduan absolut) which can only be complained by certain persons. Meanwhile, in Islamic law, adultery is a common *delict*.
3. There are sanctions for adultery perpetrators in Islamic law and the National Criminal Code. However, the forms of sanctions from both are different. In Islamic law, the sanctions are: 1) one hundred lashes; 2) exile for one year. (for *ghairu muḥṣan* status) and 1) one hundred lashes; 2) stoning (*rajam*). (for *muḥṣan* status). Meanwhile, in the

National Penal Code, the sanctions are: 1) up to a maximum imprisonment of one year or; 2) category II fine is the maximum fine (up to IDR 10,000,000).

#### **F. Islamic Law Values in the National Penal Code Viewed from Jasser Auda's System Approach**

As for the cognitive feature, *fiqh* is the result of a *faqih's* understanding of the *nas* to reveal the implied meaning or practical implications of the religious text. *Fiqh* is part of human cognition (*idrak*) and human understanding (*fahm*), not a manifestation of Allah's command. The difference between *fiqh* and *sharīa* is that *fiqh* is *dzanny* (conjectural), while *sharīa* is *qat'iy* (absolute). So, the truth of *fiqh* is temporary (dynamic).<sup>94</sup>

The National Penal Code is actually a reformation of the former Penal Code, namely the *Wvs* (*Wetboek van Strafrecht*). The reformation was carried out because the former Penal Code was no longer relevant to the current condition of Indonesian society. If it is associated with the cognition feature, the Draft Bill of Penal Code, which later became the National Penal Code, is the result of '*ijtihad*' of the formulators and *fuqaha*, this was conveyed by Prof. Muhammad Amin, who is one of the Members of the Draft Bill of Penal Code Formulation Team.<sup>95</sup>

---

<sup>94</sup> Muhammad Ali Murtadlo, "Analisis Maqasid Syariah Jasser Auda Terhadap Counter Legal Draft Kompilasi Hukum Islam," *Al-Syakhsyiyah Journal of Law and Family Studies*, Vol. 3 No. 2 (2021): 15 <http://dx.doi.org/10.21154/syakhsyiyah.v3i2.3118>

<sup>95</sup> Anonymous, "Prof. Dr. M. Amin Suma, SH, MA, MM : RUU KUHP Selaras dengan Hukum Pidana Islam," *uinjkt.ac.id*, 24 April 2013, accessed on April 2, 2023,



In the National Penal Code, there are several articles that are in line with Islamic law. For example, in the article on adultery, there is an expansion of the crime of adultery, which in the Dutch heritage Penal Code is only imposed on people who are married and then commit adultery (cheating). While in the National Penal Code, the article of adultery can be imposed on men and women who have intercourse without a marital bond between them, whether the perpetrator is married or single. The prohibition of adultery in the National Penal Code is in line with Islamic law, which also prohibits it. In the Qur'an, Surah al-Isra verse 32 states:

وَلَا تَقْرَبُوا الزَّوْجَ إِذَا هُوَ فِي حَيْضَةٍ إِنَّهُ رَفِيسٌ ۗ  
 وَلَا تَقْرَبُوا الزَّوْجَ إِذَا هُوَ فِي حَيْضَةٍ إِنَّهُ رَفِيسٌ ۗ  
 وَلَا تَقْرَبُوا الزَّوْجَ إِذَا هُوَ فِي حَيْضَةٍ إِنَّهُ رَفِيسٌ ۗ

Meaning:

*And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.*<sup>97</sup> (QS. al-Isra verse 32)

As for the openness feature, the Islamic law system is an open system which means there is no closing of the door to *ijtihad*. Islamic law can be developed in accordance with the development of the era to deal with

---

<https://www.uinjkt.ac.id/prof-dr-m-amin-suma-sh-ma-mm-ruu-kuhp-selaras-dengan-hukum-pidana-islam/>

<sup>96</sup> Tim Penerjemah, *Al-Qur'an dan Terjemahannya Edisi Penyempurnaan*, (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Balitbang Diklat Kemenag RI, 2019), 397.

<sup>97</sup> Saheeh International, *The Qur'an English Meanings*, (Jeddah: Al-Muntada Al-Islami, 2004), 266.

contemporary issues in dynamic human life. Islamic law can be flexible according to the context of the era, circumstances, and place.

The application of the value of the openness feature in the process of forming the National Penal Code can be seen from the urgency of its formation. The Penal Code (*Wetboek van Strafrecht*) is considered to be “out of date,” so it requires reforms that adapt to the ‘urf in Indonesia. This reformation resulted in a National Penal Code with an “Indonesian flavor.” In the article on adultery, the Penal Code (*Wetboek van Strafrecht*) views adultery (*zina*) as sexual intercourse committed by a married man or woman with a woman or man who is not their wife or husband.<sup>98</sup> Meanwhile, society interprets adultery as an act committed by any person who has sexual intercourse outside a legal relationship (without a marital relationship), whether married or not.<sup>99</sup> Society's view is also in line with the definition of adultery in Islamic law, which is intercourse committed by a man and a woman without a marriage bond between them, whether the perpetrator's status is *muḥṣan* or *ghairu muḥṣan*.

## **G. Islamic Law Values in the National Penal Code Related to the Adultery**

### ***Delict in the Contemporary Maqāṣid Sharīa Perspective***

The development from classical maqāṣid sharīa theory to contemporary maqāṣid sharīa theory is shown by:

---

<sup>98</sup> Read: adultery article in the Penal Code (*Wetboek van Strafrecht*)

<sup>99</sup> Pahrur Rizal, “Reformulasi Tindak Pidana Perzinahan dalam Sistem Hukum Pidana Indonesia,” *JATISWARA Jurnal Ilmu Hukum*, Vol. 32 No.1, Maret 2017: 131  
<http://jatiswara.unram.ac.id/index.php/js/article/view/75/71>

1. The concept of *hifz nasl*, which means “preservation of offspring,” has evolved into “care for the family,” “the existence of a civilized Islamic social system.”
2. The concept of *hifz ‘aql*, which means “preservation of the mind,” has also evolved into “development of scientific thought,” “the journey of seeking knowledge,” “suppressing the herd mentality,” and even “avoiding the immigration of experts go abroad.”
3. The concept of *hifz al-‘ird*, which means “preservation of honor,” has also evolved into “preservation of human dignity” and “safeguarding human rights.”
4. The concept of *hifz al-din*, which means “preservation of religion,” has also evolved into “freedom of faith” in contemporary expressions.
5. The concept of *hifz al-mal*, which means “preservation of wealth,” has also evolved into “preservation of the economy” and “minimizing the gap between classes.”<sup>100</sup>

The National Penal Code in article 411 paragraph (1) states that:

*Setiap Orang yang melakukan persetubuhan dengan orang yang bukan suami atau istrinya, dipidana karena perzinaan, dengan pidana penjara paling lama 1 (satu) tahun atau pidana denda paling banyak kategori II.*

---

<sup>100</sup> Muhammad Iqbal Fasa, “Reformasi Pemahaman Teori Maqasid Syariah Analisis Pendekatan Sistem Jasser Auda,” *Hunafa: Jurnal Studia Islamika*, Vol. 13, No. 2 Desember 2016: 231  
<https://doi.org/10.24239/jsi.v13i2.438.218-246>

From this article, it can be understood that the National Penal Code prohibits adultery, which is sexual intercourse between a man and a woman without a marriage bond between them. If it is linked to *hifz al-nasl*, the article on the prohibition of adultery is a form of protection for family resilience because the consequences of adultery can affect family harmony. Everyone would want their family to be harmonious, not a “broken family.”

The human being, in accordance with his nature, does not want the women in his family to be adulterated, whether it is his mother, daughter, or wife. A husband who loves his wife is not willing for her to commit adultery.<sup>101</sup> Vice versa, a wife who loves her husband is also not willing if her husband commits adultery.

Adultery can also cause various diseases. One of the diseases caused by adultery is HIV/AIDS. It is a contagious disease and causes various social and economic impacts.<sup>102</sup> The impact from a social perspective, the family, which is the smallest part of society, is the most vulnerable community to contract the disease. The impact, from an economic perspective, is if the person living with HIV/AIDS is the breadwinner (the person who works) in the family, it can cause the economy of the family to collapse. Thus, the family cannot fulfill their daily needs.

---

<sup>101</sup> Tamrin, “Zina dalam Perspektif Tafsir Al-Qur’an,” *MUSAWA: Journal For Gender Studies*, Vol. 11 No. 1 (2019): 11-12 <https://doi.org/10.24239/msw.v11i1.439>

<sup>102</sup> I G Wiswasa Abhinaja dan Putu Ayu Swandewi Astuti, “Pengetahuan, Sikap Ibu Rumah Tangga Mengenai Infeksi Menular Seksual Termasuk HIV/AIDS Serta Perilaku Pencegahannya Di Kelurahan Sanur, Kecamatan Denpasar Selatan, Kota Denpasar Tahun 2013,” *Community Health*, VOLUME I, No 3 Juli 2013: 219 <https://ojs.unud.ac.id/index.php/jch/article/view/7654/5745>

MBA (married by accident) is also an implication of adultery. MBA is one of the factors in underage marriage. The MBA phenomenon, which results in many underage marriages, has the potential to damage family resilience and harmony. Underage marriage will have an impact on the social environment, and infidelity will often occur, which makes the relationship disharmonious if there is a quarrel, and domestic violence/kekerasan dalam rumah tangga (KDRT) or sexual violence that occurs can also cause imbalance in the family.<sup>103</sup>

In Indonesian society, the perpetrators of adultery and children resulting from adulterous relationships are sometimes ridiculed by the community. This is a social sanction received by them. Children resulting from adultery are assumed to be illegitimate, a very insulting word. Even though the Indonesian Ulema Council (MUI) fatwa states that children born of adultery are children who are born in a pure condition and do not carry derivative sins.<sup>104</sup>

As associated with *hifz al- 'ird*, the ridicule from the community that has been described above must have lowered the self-esteem of the perpetrator of adultery and the child resulting from the adultery. Such a situation has the potential to degrade the dignity of a human being who is actually protected by the state. The Indonesian constitution states that:

---

<sup>103</sup> Mohamad Abdul Azis dan M. Avrizal Virmansyah, "Pengaruh Perkawinan di Bawah Umur terhadap Tingkat Perceraian," *Al-Ihath: Jurnal Bimbingan dan Konseling Islam*, Volum 02, Nomor 01, Januari 2022: 50 <https://doi.org/10.53915/jbki.v2i1.166>

<sup>104</sup> Fatwa of the Indonesian Ulema Council (MUI) Number 11 of 2012 concerning the Position of Adulterated Children and Their Treatment. This Fatwa can be downloaded at <https://mui.or.id/wp-content/uploads/files/fatwa/Kedudukan-Anak-Hasil-Zina-dan-Perlakuan-Terhadapnya-final.pdf>

*“Setiap orang berhak untuk bebas dari penyiksaan atau perlakuan yang merendahkan derajat martabat manusia ...”<sup>105</sup>,<sup>106</sup>.*

Also, the law on human rights states:

*“Setiap orang berhak untuk bebas dari penyiksaan, penghukuman atau perlakuan yang kejam, tidak manusiawi, merendahkan derajat dan martabat kemanusiaannya.”<sup>107</sup>,<sup>108</sup>*

Adultery can also cause other crimes, such as infanticide resulting from adultery. There are many cases of infanticide resulting from adultery in Indonesia. An example is what happened in Ciamis Regency, West Java. The perpetrator is a university student with the initials J who is 18 years old. The motive for infanticide was because the perpetrator (J) felt ashamed of having a child from an illicit relationship with a man she knew.<sup>109</sup> The next example is what happened in Madiun Regency, East Java. The perpetrator is a woman with the initials IMS who is 25 years old. The motive for infanticide is also the same as the cases previously described, which is because she was ashamed of having a child from an illicit or adulterous relationship with her boyfriend.<sup>110</sup> Infanticide obviously violates the right to

---

<sup>105</sup> Free translation: “Everyone has the right to be free from torture or degrading treatment...”

<sup>106</sup> Article 28 G paragraph (2) Constitution of the Republic of Indonesia 1945.

<sup>107</sup> Free translation: “Everyone has the right to be free from torture, punishment or cruel, inhuman, degrading the human treatment.”

<sup>108</sup> Article 33 paragraph (1) of Law Number 39 of 1999 concerning Human Rights.

<sup>109</sup> Faisal Zamzami, “Mahasiswi Bunuh Bayinya Usai Melahirkan, Malu Hasil Hubungan Zina, Siapa Pria yang Menghamilinya?,” *Serambinews.com*, 4 November 2022, accessed on April 10, 2023, <https://aceh.tribunnews.com/2022/11/04/mahasiswi-bunuh-bayinya-usai-melahirkan-malu-hasil-hubungan-zina-siapa-pria-yang-menghamilinya>

<sup>110</sup> Endra Kurniawan, “Berdalih Malu Punya Anak Hasil Zina dengan Pacar, Wanita Muda di Madiun Tega Bunuh Bayinya,” *Tribunnews.com*, 22 April 2022, accessed on April 10, 2023,

life, which is a human right. Anyone, including the baby's parents, cannot take away the baby's human rights.<sup>111</sup> This incident is also undesirable for the concept of *hifz al-'ird*, which intends to preserve human dignity and safeguard human rights.

Furthermore, the perpetrator of adultery, who is still a student at school or college, if the adulterous act is caught, especially if there is pregnancy outside of marriage, then the perpetrator can be expelled from the institution where the perpetrator is studying.<sup>112</sup> As happened in Lahat, South Sumatra. Residents of Lahat were shocked because of the spread of a perverted video played by two students. Both of them, who are still high school (SMA) students, were expelled from the institution where they studied. They were expelled because they were considered to have damaged the good name of the school.<sup>113</sup> A similar case also occurred in Buleleng, Bali. This is a case of circulating a perverted video played by a couple who are still students. For the perverted video that was spread, the two actors were expelled from school. The couple who played the perverted video were expelled because they were considered to have violated school rules.<sup>114</sup> From these two

---

<https://www.tribunnews.com/regional/2022/04/22/berdalih-malu-punya-anak-hasil-zina-dengan-pacar-wanita-muda-di-madiun-tega-bunuh-bayinya>

<sup>111</sup> Read: Article 4 of Law Number 39 of 1999 concerning Human Rights.

<sup>112</sup> Farah Edhar Khaerunisa, "Adultery In The Perspective Of Islamic Religious Law And Positive Law In The Indonesian Community," *Jurnal Hunafa: Studia Islamika*, Volume 18, No.2: 171  
<https://doi.org/10.24239/jsi.v18i2.614.158-174>

<sup>113</sup> Eko Faizin, "Video Mesum di Toilet Viral, Dua Pelajar SMA Dikeluarkan dari Sekolah," *SuaraRiau.id*, 20 Oktober 2021, accessed on April 10, 2023,  
<https://riau.suara.com/read/2021/10/20/200534/video-mesum-di-toilet-viral-dua-pelajar-sma-dikeluarkan-dari-sekolah>

<sup>114</sup> Anonymous, "Pemeran Video Mesum Dikeluarkan dari Sekolah," *NusaBali.com*, 28 Jan 2023, accessed on April 10, 2023, <https://www.nusabali.com/berita/134457/pemeran-video-mesum-dikeluarkan-dari-sekolah>

examples, it can be concluded that adultery committed among students can cause the adulterous student to be expelled from school. This means that the adulterous student's journey in studying has stopped. This situation is not desired by the concept of *hifz 'aql*.

From the concept of *hifz al-din*, it is shown that the prohibition of adultery in the National Penal Code is in line with the rules of religions in Indonesia. Islam, Christianity, Hinduism, and Buddhism prohibit adultery. Obeying the rules on the prohibition of adultery in the National Penal Code means preserving the teachings of existing religions in Indonesia and also as a form of freedom of faith (religion) in the context of nation and state. This is because Indonesia is a state of law<sup>115</sup> based on “Ketuhanan Yang Maha Esa.”<sup>116,117</sup>

---

<sup>115</sup> Article 1 paragraph (3) Constitution of the Republic of Indonesia 1945.

<sup>116</sup> Free translation: “the Almighty God”

<sup>117</sup> Article 29 paragraph (1) Constitution of the Republic of Indonesia 1945.



## CHAPTER IV

### CLOSING

#### A. Conclusion

Based on the results of research on the values of Islamic law in the National Penal Code in article 411 concerning adultery from the perspective of Jasser Auda's Maqāṣid Sharīa, the following conclusions can be drawn:

1. The urgency of the reformation of the adultery *delict* in the National Penal Code will be briefly explained as follows. First, the meaning of the term “*zina*” (adultery) in the Penal Code (Wetboek van Strafrecht) is not in line with the meaning of the term “*zina*” from the society's perspective. Secondly, “*zina*” (as the term is used by the society) is a violation of religious values, decency and the values contained in Pancasila.
2. The National Penal Code contains Islamic law values, namely: **a)** the definition of “*zina*” (adultery) in Islamic law and the National Penal Code is the same (*zina* is intercourse committed by a man and a woman without a marriage bond); **b)** Islamic law (in Surah al-Isra verse 32) and the National Penal Code (in Article 411 paragraph 1) both prohibit adultery. However, in the National Penal Code, adultery article is an absolute complaint *delict* (delik aduan absolut) which can only be complained by certain persons. Meanwhile, in Islamic law, adultery is a common *delict*; **c)** there are sanctions for

adultery perpetrators in Islamic law (the sanctions are: 1) one hundred lashes; 2) exile for one year. [for *ghairu muḥṣan* status] and 1) one hundred lashes; 2) stoning (*rajam*). [for *muḥṣan* status]) and the National Criminal Code (the sanctions are: 1) up to a maximum imprisonment of one year or; 2) category II fine is the maximum fine [up to IDR 10,000,000]). However, the forms of sanctions from both are different.

3. The values of Islamic law on adultery article in the National Penal Code based on Jasser Auda's *Maqāṣid Sharīa* Perspective are: **a)** from **Jasser Auda's system approach** are in line with the **cognitive features** (because the National Penal Code is the result of '*ijtihad*' of the formulators and *fuqaha*) and **openness features** (because the Penal Code [*Wetboek van Strafrecht*] is considered to be “out of date,” so it requires reforms that adapt to the '*urf*' in Indonesia. This reformation resulted in a National Penal Code with an “Indonesian flavor.” Which contains the values of Islamic law in the adultery article on it; **b)** from **the concept of contemporary Maqāṣid Sharīa** are in line with *hifz al-nasl* (namely care for the family), *hifz 'aql* (namely the journey of seeking knowledge), *hifz al-'ird* (namely preservation of human dignity and safeguarding human rights), *hifz al-din* (namely “freedom of faith” in contemporary expressions).

## **B. Suggestion**

In the end, the researcher will write down the suggestions in this research which are presented below:

1. The National Penal Code is still relatively new and will be effective within three years after its enactment. Prior to its effective implementation, massive education and socialization to the public regarding this National Penal Code are needed.
2. In the researcher's opinion, the sanction for adultery *delict* in the National Penal Code is still relatively lenient. Therefore, it needs to be aggravated in order to provide a deterrent effect, and society will think twice about committing the crime of adultery. Given, the effects of committing adultery are very many, ranging from the destruction of the nation's morals to the emergence of various sexual diseases, and others.
3. This thesis is far from "perfect," but hopefully, it can be an inspiration and add insight to the readers. For future researchers, it is hoped that they can complete the shortcomings in this research.

## BIBLIOGRAPHY

### Book

- Tim Penerjemah, *Al-Qur'an dan Terjemahannya Edisi Penyempurnaan*. Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Balitbang Diklat Kemenag RI, 2019.
- Wahiduddin Khan. *The Quran*. New Delhi: Goodword Books, 2009.
- Saheeh International. *The Qur'an English Meanings*. Jeddah: Al-Muntada Al-Islami, 2004.
- Thomas Nelson. *The Holy Bible, New King James Version*. Nashville: Thomas Nelson Publishers, 1982.
- Auda, Jasser. *Maqasid Al-Shariah As Philosophy Of Islamic Law: A Systems Approach*. Washington: The International Institute Of Islamic Thought, 2008.
- Auda, Jasser. *Membumikan Hukum Islam Melalui Maqasid Syariah*, terj. Rosidin dan Ali Abd el-Mun'in. Bandung: PT Mizan Pustaka, 2015.
- Amrani, Hanafi. *Politik Pembaruan Hukum Pidana*. Yogyakarta : UII Press, 2019.
- BP, Abdurrahman Misno. *Panorama Maqashid Syariah*. Bandung: Penerbit Media Sains Indonesia, 2021.
- Soekanto, Soerjono dan Sri Mahmuji. *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. Depok: Raja Grafindo Persada, 2019.
- Sahetapy, dan B. Mardjno Reksodiputro. *Parados dalam Kriminologi*. Jakarta: Rajawali, 1989.
- Ichsan, Muchammad. *Pengantar Hukum Islam*. Yogyakarta: Percetakan Muhammadiyah "Gramasurya", 2015.
- Wahyuni, Fitri. *Hukum Pidana Islam (Aktualisasi Nilai-Nilai Hukum Pidana Islam Dalam Pembaharuan Hukum Pidana Indonesia)*. Tangerang: PT Nusantara Persada Utama, 2018.
- Al-Hafiz, Abu Mazaya & Abu Izzat Al-Sahafi. *Fiqh Jenayah Islam*. Kuala Lumpur: Al-Hidayah Publication, 2003.

- Helim, H. Abdul. *MAQĀSĪD AL-SHARĪ'AH versus UŞŪL AL-FIQH (Konsep dan Posisinya dalam Metodologi Hukum Islam)*. Yogyakarta: Pustaka Pelajar, 2019.
- Soesilo, R. *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*. Bogor: Politeia, 1976.
- Christianto, Hwian. *Mengurai Kejahatan Kesusilaan Melalui Penafsiran Ekstensif dan Studi Kasus*. Yogyakarta: Suluh Media, 2017.
- Marsaid, H. *AL-FIQH AL-JINAYAH (Hukum Pidana Islam) Memahami Tindak Pidana Dalam Hukum Islam*. Palembang: Rafah Press, 2020.
- An-Nawawi, Imam. *Al-Minhaj Syarh Shahih Muslim ibn al-Hajjaj*, Terj. Thoriq Abdul Aziz At-Tamimi dan Fathoni Muhammad, "Syarah Shahih Muslim", Jilid 8. Jakarta: Darus Sunnah Press, 2010.

### Journal

- Rahmayani, Nuzul. "Urgensi Rekonstruksi Ketentuan Pasal 284 KUHP Berbasis Nilai-Nilai Pancasila," *MENARA Ilmu*, Vol. X Jilid 1 No.70 September 2016: 111  
<https://jurnal.umsb.ac.id/index.php/menarailmu/article/view/99/81>
- Khalimy, Akhmad. "Makna Aturan Peralihan Sebagai Politik Hukum RUU KUHP (Transformasi Dari Hukum Kolonial Ke Hukum Nasional)," *Jurnal Hukum Progresif*, Vol. 8, No. 2, Oktober 2020: 124  
<https://doi.org/10.14710/jhp.8.2.121-136>
- Khaerunisa, Farah Edhar. "Adultery In The Perspective Of Islamic Religious Law And Positive Law In The Indonesian Community," *Jurnal Hunafa: Studia Islamika*, Volume 18, No.2: 171  
<https://doi.org/10.24239/jsi.v18i2.614.158-174>
- Alfatdi, Azka Rasyad, Inez Andriana Regita Cahyani, dan Sabrina Khusnannisa, "Menelisik Lebih Dalam Pengaturan Tindak Pidana Perzinahan dalam RKUHP Melalui Berbagai Pandangan," *Jurnal Studia Legalia : Jurnal Ilmu Hukum*, Volume 3 Nomor 1, Oktober 2022: 15  
<https://studialegalia.ub.ac.id/index.php/studialegalia/article/view/21/19>
- Rizal, Pahrur. "Reformulasi Tindak Pidana Perzinahan dalam Sistem Hukum Pidana Indonesia," *JATISWARA Jurnal Ilmu Hukum*, Vol. 32 No.1, Maret 2017: 131 <http://jatiswara.unram.ac.id/index.php/js/article/view/75/71>
- Bahiej, Ahmad. "Tinjauan Yuridis Atas Delik Perzinahan (Overspel) Dalam Hukum Pidana Di Indonesia," *SOSIO-RELIGIA*, Vol. 2, No. 2, Februari 2003: 7 <https://www.researchgate.net/publication/315693603>

- Utsany, Royan, Afrizal Tw, and Khamim. "Women's Rights and Gender Equality: An Analysis of Jasser Auda's Thoughts and His Contribution to Renewal of Islamic Family Law in Indonesia," *Journal of Islamic Law (JIL)*, Vol. 3, No. 1, 2022: 57 <https://doi.org/10.24260/jil.v3i1.530>
- Siahaan, Julia Rahmayanti. "Sistem Pembuktian Tindak Pidana Perzinaan Dalam Perspektif Hukum Pidana Positif Dan Hukum Pidana Islam," *AL-QANUN: Jurnal Kajian Sosial dan Hukum Islam*, Volume 1, Nomor 1, Maret 2020: 71  
<https://moraref.kemenag.go.id/documents/article/99047180253355956/download>
- Putra, Dedisyah, Asrul Hamid, dan Martua Nasution, "Metodelogi Maqashid Al-Syari'ah Jasser Auda Sebagai Pendekatan Baru Sistem Hukum Islam", *AL-SYAKHSHIYYAH: Jurnal Hukum Keluarga Islam dan Kemanusiaan*, Vol. 4; No. 1; Juni 2022: 94 <http://dx.doi.org/10.35673/as-hki.v4i1.2427>
- Fageh, Achmad. "Contextualization of Mashlahah Jasser Auda's Thought in Islamic Economy," *Indonesian Interdisciplinary Journal of Sharia Economics (IIJSE)*, Vol. 4 No. 1 July 2021: 136  
<https://doi.org/10.31538/ijse.v4i1.1344>
- Gangga, Desak Ayu, Evander, dan Joshua Giorgio, "Kontroversi Perzinahan di Mata Agama Dan Hukum Yang Berlaku Di Indonesia Dengan Fakta Lapangan," *Jurnal Supremasi*, Volume 10, Nomor 1, Maret 2020: 49  
<https://doi.org/10.35457/supremasi.v10i1.862>
- Adinugraha, Hendri Hermawan, Fakhroddin, dan Mashudi. "The Reconstruction of Maqāṣīdal- Syarī'ah Approach In Islamic Economy: Insights From Jasser Auda Perspective," *Social Sciences and Education Research Review*, (7) 2 206 - 224 (2020): 208 <https://sserr.ro/wp-content/uploads/2020/12/sserr-7-2-206-224.pdf>
- Hadi, Samsul. "Pendekatan Multidisipliner Dalam Pengembangan Hukum Islam ( Menurut Pandangan : Jasser Auda )," *Bintang: Jurnal Pendidikan dan Sains*, Volume 2, Nomor 3, Desember 2020: 336-337  
[10.36088/bintang.v2i3.978](https://doi.org/10.36088/bintang.v2i3.978)
- Putra, Muhammad Habib Adi, Umi Sumbulah. "Memaknai Kembali Konsep Nusyuz Dalam Kompilasi Hukum Islam Perspektif Gender & Maqashid Syariah Jasser Auda," *EGALITA: Jurnal Kesetaraan dan Keadilan Gender*, Volume 15, No 1, Tahun 2020: 47  
<https://doi.org/10.18860/egalita.v15i1.10179>
- Ismayawati, Any. "Konsistensi Pasal 284 KUHP Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *Legality*, Vol.24, No.1, Maret 2016-Agustus 2016: 94

<https://ejournal.umm.ac.id/index.php/legality/article/download/4259/4626/11069>

- Murtadlo, Muhammad Ali. "Analisis Maqasid Syariah Jasser Auda Terhadap Counter Legal Draft Kompilasi Hukum Islam," *Al-Syakhsiyyah Journal of Law and Family Studies*, Vol. 3 No. 2 (2021): 15  
<http://dx.doi.org/10.21154/syakhsiyyah.v3i2.3118>
- Tamrin. "Zina dalam Perspektif Tafsir Al-Qur'an," *MUSAWA: Journal For Gender Studies*, Vol. 11 No. 1 (2019): 11-12  
<https://doi.org/10.24239/msw.v11i1.439>
- Abhinaja, I G Wiswasa, dan Putu Ayu Swandewi Astuti. "Pengetahuan, Sikap Ibu Rumah Tangga Mengenai Infeksi Menular Seksual Termasuk HIV/AIDS Serta Perilaku Pencegahannya Di Kelurahan Sanur, Kecamatan Denpasar Selatan, Kota Denpasar Tahun 2013," *Community Health*, VOLUME I, No 3 Juli 2013: 219  
<https://ojs.unud.ac.id/index.php/jch/article/view/7654/5745>
- Fasa, Muhammad Iqbal. "Reformasi Pemahaman Teori Maqasid Syariah Analisis Pendekatan Sistem Jasser Auda," *Hunafa: Jurnal Studia Islamika*, Vol. 13, No. 2 Desember 2016: 231 <https://doi.org/10.24239/jsi.v13i2.438.218-246>
- Azis, Mohamad Abdul dan M. Avrizal Virmansyah. "Pengaruh Perkawinan di Bawah Umur terhadap Tingkat Perceraian," *Al-Ihath: Jurnal Bimbingan dan Konseling Islam*, Volum 02, Nomor 01, Januari 2022: 50  
<https://doi.org/10.53915/jbki.v2i1.166>

### Internet

- Anonymous "Prof. Dr. M. Amin Suma, SH, MA, MM : RUU KUHP Selaras dengan Hukum Pidana Islam," *uinjkt.ac.id*, 24 April 2013, accessed on April 2, 2023, <https://www.uinjkt.ac.id/prof-dr-m-amin-suma-sh-ma-mm-ruu-kuhp-selaras-dengan-hukum-pidana-islam/>
- MKRI "YLBHI: Perluasan Definisi Zina Berdampak pada HAM," *mkri.id*, 26 September 2016, accessed on Januari 7, 2023, <https://www.mkri.id/index.php?page=web.Berita&id=13326>
- Harruma, Issha "Sejarah KUHP dan Perjalanan Menuju KUHP Baru," *Kompas*, 5 Juli 2022, accessed on October 7, 2022, <https://nasional.kompas.com/read/2022/07/05/01500051/sejarah-kuhp-dan-perjalanan-menuju-kuhp-baru>

- Sandi, Ferry “104 Tahun RI Pakai Hukum Belanda, Kapan KUHP Baru Berlaku?,” *CNBC Indonesia*, 8 Desember 2022, accessed on January 2, 2023, <https://www.cnbcindonesia.com/news/20221208162013-4-395032/104-tahun-ri-pakai-hukum-belanda-kapan-kuhp-baru-berlaku>
- Ibrahim, Adi “Jokowi Resmi Sahkan KUHP Baru Jadi Undang-undang,” *CNN Indonesia*, 2 Januari 2023, accessed on January 10, 2023, <https://www.cnnindonesia.com/nasional/20230102210655-12-895245/jokowi-resmi-sahkan-kuhp-baru-jadi-undang-undang>
- Wildansyah, Samsudhuha “MUI Setuju Perluasan Makna Zina di RUU KUHP,” *detikNEWS*, 21 September 2019, accessed on October 1, 2022, <https://news.detik.com/berita/d-4715688/mui-setuju-perluasan-makna-zina-di-ruu-kuhp/2>
- Rasyid, Shani “Pasal Perzinahan di RUU KUHP Bisa Kontraproduktif, Ini Penjelasan PHRI DIY,” *Merdeka.com*, 26 Oktober 2022, accessed on October 29, 2022, <https://www.merdeka.com/jateng/pasal-perzinahan-di-ruu-kuhp-bisa-kontraproduktif-ini-penjelasan-phri-diy.html>
- Tim TvOne, Antara “Pasal Zina dalam RUU KUHP, Wisatawan Asing Bakal 'Kabur' ke Negara Lain,” *tvOnenews*, 20 Oktober 2022, accessed on October 25, 2022, <https://www.tvonenews.com/berita/nasional/76082-pasal-zina-dalam-ruu-kuhp-wisatawan-asing-bakal-kabur-ke-negara-lain>
- Anonymous “Muslim Population by Country 2023,” *World Population Review*, 2023, accessed on April 10, 2023, <https://worldpopulationreview.com/country-rankings/muslim-population-by-country>
- Zamzami, Faisal “Mahasiswi Bunuh Bayinya Usai Melahirkan, Malu Hasil Hubungan Zina, Siapa Pria yang Menghamilinya?,” *Serambinews.com*, 4 November 2022, accessed on April 10, 2023, <https://aceh.tribunnews.com/2022/11/04/mahasiswi-bunuh-bayinya-usai-melahirkan-malu-hasil-hubungan-zina-siapa-pria-yang-menghamilinya>
- Kurniawan, Endra “Berdalih Malu Punya Anak Hasil Zina dengan Pacar, Wanita Muda di Madiun Tega Bunuh Bayinya,” *Tribunnews.com*, 22 April 2022, accessed on April 10, 2023, <https://www.tribunnews.com/regional/2022/04/22/berdalih-malu-punya-anak-hasil-zina-dengan-pacar-wanita-muda-di-madiun-tega-bunuh-bayinya>
- Faizin, Eko “Video Mesum di Toilet Viral, Dua Pelajar SMA Dikeluarkan dari Sekolah,” *SuaraRiau.id*, 20 Oktober 2021, accessed on April 10, 2023, <https://riau.suara.com/read/2021/10/20/200534/video-mesum-di-toilet-viral-dua-pelajar-sma-dikeluarkan-dari-sekolah>
- Anonymous “Pemeran Video Mesum Dikeluarkan dari Sekolah,” *NusaBali.com*, 28 Jan 2023, accessed on April 10, 2023,



<https://www.nusabali.com/berita/134457/pemeran-video-mesum-dikeluarkan-dari-sekolah>

Fauzi “Pakar: Pasal perzinaan di RUU KUHP upaya melindungi perempuan,” *ANTARA*, 9 Juni 2021, accessed on October 1, 2022, <https://www.antaraneews.com/berita/2201958/pakar-pasal-perzinaan-di-ruu-kuhp-upaya-melindungi-perempuan>

Jasser Auda's biography at [www.jasserauda.net](http://www.jasserauda.net)

### **Legislation**

Constitution of the Republic of Indonesia 1945.

Law Number 39 of 1999 concerning Human Rights.

Law Number 1 of 2023 concerning the Penal Code.

Law Number 11 of 2008 concerning Electronic Information and Transactions.

Penal Code (*Wetboek van Strafrecht*).

Criminal Procedure Code (KUHAP).

Draft Bill of Penal Code (RUU KUHP) of 2022 (Final Draft December 6).

## APPENDIXES

### Home page of the National Penal Code



PRESIDEN  
REPUBLIK INDONESIA

SALINAN

UNDANG-UNDANG REPUBLIK INDONESIA

NOMOR 1 TAHUN 2023

TENTANG

KITAB UNDANG-UNDANG HUKUM PIDANA

DENGAN RAHMAT TUHAN YANG MAHA ESA

PRESIDEN REPUBLIK INDONESIA,

- Menimbang :
- a. bahwa untuk mewujudkan hukum pidana nasional Negara Kesatuan Republik Indonesia yang berdasarkan Pancasila dan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 serta asas hukum umum yang diakui masyarakat bangsa-bangsa, perlu disusun hukum pidana nasional untuk mengganti Kitab Undang-Undang Hukum Pidana warisan pemerintah kolonial Hindia Belanda;
  - b. bahwa hukum pidana nasional tersebut harus disesuaikan dengan politik hukum, keadaan, dan perkembangan kehidupan bernasyarakat, berbangsa, dan bernegara yang bertujuan menghormati dan menjunjung tinggi hak asasi manusia, berdasarkan Ketuhanan Yang Maha Esa, kemanusiaan yang adil dan beradab, persatuan Indonesia, kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan/perwakilan, dan keadilan sosial bagi seluruh rakyat Indonesia;
  - c. bahwa materi hukum pidana nasional juga harus mengatur keseimbangan antara kepentingan umum atau negara dan kepentingan individu, antara perlindungan terhadap pelaku tindak pidana dan korban tindak pidana, antara unsur perbuatan dan sikap batin, antara kepastian hukum dan keadilan, antara hukum tertulis dan hukum yang hidup dalam masyarakat, antara misi nasional dan nilai universal, serta antara hak asasi manusia dan kewajiban asasi manusia;

d. bahwa . . .

## Article on adultery in the National Penal Code

Bagian Keempat  
Perzinaan

Pasal 411

- (1) Setiap Orang yang melakukan persetubuhan dengan orang yang bukan suami atau istrinya, dipidana karena perzinaan, dengan pidana penjara paling lama 1 (satu) tahun atau pidana denda paling banyak kategori II.

(2) Terhadap . . .

SK No 161140 A



**PRESIDEN  
REPUBLIK INDONESIA**

- 141 -

- (2) Terhadap Tindak Pidana sebagaimana dimaksud pada ayat (1) tidak dilakukan penuntutan kecuali atas pengaduan:
  - a. suami atau istri bagi orang yang terikat perkawinan.
  - b. Orang Tua atau anaknya bagi orang yang tidak terikat perkawinan.
- (3) Terhadap pengaduan sebagaimana dimaksud pada ayat (2) tidak berlaku ketentuan sebagaimana dimaksud dalam Pasal 25, Pasal 26, dan Pasal 30.
- (4) Pengaduan dapat ditarik kembali selama pemeriksaan di sidang pengadilan belum dimulai.

## **Consultation proof sheet**



KEMENTERIAN AGAMA REPUBLIK INDONESIA  
UNIVERSITAS ISLAM NEGERI MAULANA MALIK IBRAHIM MALANG  
FAKULTAS SYARIAH

Jl. Gajayana 50 Malang 65144 Telepon (0341) 559399 Faksimili (0341) 559399  
Website Fakultas: <http://syariah.uin-malang.ac.id> atau Website Program Studi: <http://fd.uin-malang.ac.id>

CONSULTATION PROOF

Name : Riki Sanjaya Ihyara  
Student Number : 19210139  
Department : Islamic Family Law  
Supervisor : Jamilah, M.A.  
Thesis Title : **ISLAMIC LAW VALUES IN ARTICLE 411 CONCERNING ADULTERY IN THE NATIONAL PENAL CODE BASED ON JASSER AUDA'S MAQĀSĪD SHARĪA PERSPECTIVE**

No	Day/Date	Subject of Consultation	Signature
1	Tuesday, 24 January 2023	Consultation Chapter I	
2	Tuesday, 24 January 2023	Consultation Chapter II	
3	Thursday, 9 February 2023	ACC Chapter I	
4	Thursday, 9 February 2023	ACC Chapter II	
5	Thursday, 30 March 2023	Consultation Chapter III	
6	Tuesday, 11 April 2023	ACC Chapter III	
7	Tuesday, 9 May 2023	Consultation Chapter IV	
8	Monday, 15 May 2023	ACC Chapter IV	
9	Monday, 15 May 2023	Consultation Abstract	
10	Monday, 15 May 2023	ACC Abstract and Thesis	

Malang, 17 May 2023  
Acknowledged by,  
Head Department of Islamic Family Law


Erik Sabti Rahmawati, M.A., M.Ag.  
NIP. 197511082009012003

## Proof of plagiarism check result

Cek Plagiasi Skripsi\_Riki Sanjaya Ihyara (19210139) Kotak Masuk x


 **Riki Sanjaya Ihyara** 08.50 (47 menit yang lalu) ☆  
NAMA: RIKI SANJAYA IHYARA NIM: 19210139 PRODI: HUKUM KELUARGA ISLAM JUDUL SKRIPSI: ISLAMIC LAW VALUES IN ARTICLE 411 CONCERNING A...

---

 **Cek Plagiasi Admin** 09.14 (23 menit yang lalu) ☆ ↶ ⋮  
kepada saya ▾  
\*\*\*

NAMA : RIKI SANJAYA IHYARA  
NIM : 19210139  
PRODI : HUKUM KELUARGA ISLAM  
JUDUL SKRIPSI : ISLAMIC LAW VALUES IN ARTICLE 411 CONCERNING ADULTERY IN THE NATIONAL PENAL CODE BASED ON JASSER AUDA'S MAQĀSID SHARĪĀ PERSPECTIVE  
SIMILARITI : 9%  
TELAH LOLOS UJI SIMILARITI

\*\*\*

**Satu lampiran** • Dipindai dengan Gmail ⓘ 

## CURICULUM VITAE



### PERSONAL INFORMATION

<b>Name</b>	Riki Sanjaya Ihyara
<b>SIN</b>	19210139
<b>Place, Date of birth</b>	Probolinggo, 6 <sup>th</sup> July 2000
<b>Address</b>	Jl. Ikan Kakap IA/03 RT 02 RW 04, Kel. Mayangan, Kec. Mayangan, Kota Probolinggo, Jawa Timur 67218
<b>Phone Number</b>	(+62) 82 330 518 455
<b>Email</b>	<a href="mailto:riki.ihyara@gmail.com">riki.ihyara@gmail.com</a>
<b>Religion</b>	Islam
<b>Gender</b>	Male

### FORMAL EDUCATION

No	Institute/School	Major	Period
1	TK IT Permata Probolinggo	-	2005-2007
2	MI Muhammadiyah 1 Probolinggo	-	2007-2013
3	SMP IT Ar-Rahmah Lumajang	-	2013
4	MTs. Negeri Probolinggo	-	2013-2016
5	MA Negeri 2 Kota Probolinggo	Social Science	2016-2019
6	UIN Maulana Malik Ibrahim Malang (S-1)	Islamic Family  Law	2019-2023

### NON FORMAL EDUCATION

No	Institute/School	Major	Period
1	Collaboration between Madrasah Aliyah 2 Kota Probolinggo and ITS Surabaya (Diploma 1 Equivalent Education Program "PRODISTIK")	Information and Communication Technology	2016-2019
2	Ma'had Sunan Ampel Al-Aly	-	2019-2020