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Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

## **Criminal Act of Adultery, The Encounter Between the National Criminal Code and Islamic Law**

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**Abstract.** *The national KUHP specifically regulates the offense of adultery which is part of the crime of morality. The offense of adultery is contained in Article 411 (adultery), Article 412 (cohabitation), and Article 413 (incest)). This article will discuss how the crime of adultery meet between the KUHP and Islamic law. This article is library research using a statutory approach. Presentation of data analysis uses qualitative descriptive techniques. The research results show that there has been encounter between the KUHP and Islamic law regarding the offense of adultery. In substance, the regulations regarding the offense of adultery in the national KUHP are inspired by Islamic law. Threat of sanctions for the offense of Adultery Article 411 of the KUHP with a maximum imprisonment of 1 year or a maximum fine of category II, Article 412 with a maximum imprisonment of 6 months or a maximum fine of category II, Article 413 is punishable with a maximum imprisonment of 10 (ten) year. In Islamic law, the punishment for anyone who commits adultery with the status of ghair muḥsan is to be flogged a hundred times, and also exiled for a year. The punishment for committing adultery with muḥsan status is stoning*

**Keywords:** *Criminal Act of Adultery; Encounter; Islamic Law; National Criminal Code.*

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### **1. Introduction**

Unlike the old Criminal Code (WvS), which only limited the scope of adultery to Article 284 which substantially prohibited sexual relations with someone who was not the husband or wife. In fact, the National Criminal Code has progressively regulated in detail regarding crimes of morality and their derivatives. Immorality Offenses/Crimes are regulated separately in Chapter The third regulates the display of contraceptives and abortion tools (Article 408-Article 410), the fourth part regulates adultery (Article 411-Article 413), the fifth part regulates obscene acts (Article 414-Article 423), the sixth part regulates Drinks and Intoxicating Substances (Article 424), the seventh part regulates the use of children for begging (Article 425), the eighth part regulates gambling (Article 426-Article 427)).<sup>1</sup>

This article only limits the discussion to the adultery section, namely Article 411 (adultery), Article 412 (cohabitation/samenleven) and Article 413 (incestuous sexual relations). These three offense provisions are called adultery in the national Criminal Code. This article is not comparing criminal sanctions for adultery in the Criminal Code and Islamic law. This article remains relevant for the reason that no one has written regarding a quo problem and also the person who wrote this article is a non-Muslim. Another research that may be related to this article is Wahyuningish's research, 2023, explaining "Comparison of Adultery Laws in Law no. 1 of 2023 concerning the Criminal Code (KUHP) with Islamic Law. Wahyuningish explained, "The provisions of the adultery article in positive law have similarities with Islamic law, one of which is in terms of the legal subject, namely that there is no distinction in terms of giving sanctions between *muhsan* adulterers and *muhsan ghairu* adulterers. However, in Islamic law, the provisions on adultery are Allah's prerogative, so Allah Himself determines the law. And it is clear in the Koran and Hadith that the punishment for those who commit adultery is stoning for those who commit adultery and flogging for those who commit adultery. So, these provisions, both in terms of the level and type of punishment, cannot be replaced with other punishments such as imprisonment and fines as contained in positive law contained in Articles 411-413 of the Criminal Code. Then in terms of the nature of the offense in Islamic law, adultery is an ordinary offense so that anyone can carry out prosecution and the execution of the punishment for adultery is carried out in front of the general public, intended for the benefit of society so that people do not commit the same act. So, in this case the author concludes that the adultery regulations contained in Law no. 1 of 2023 is not in accordance with Islamic law. And in Islamic law the

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<sup>1</sup> See Undang-Undang No. 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana yang selanjutnya disebut KUHP

Criminal Act of Adultery, The Encounter Between the National ...  
( **Fransiskus Saverius Nurdin, Anis Mashdurohatun & Jawade Hafidz** )

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imposition of hudud zina sanctions is not a violation of human rights but as a consequence for those who violate sharia law.

The ratification of the new Criminal Code by the Government and the DPR on January 1 2023 is believed to be the answer to public anxiety that arises due to the legal vacuum in the WvS which does not regulate adultery, cohabitation and incest. The ratification of the Criminal Code means that legal subjects who commit adultery cannot avoid punishment. However, the ratification of the Criminal Code still causes the emergence of a dualism of understanding in society, with some agreeing and disagreeing. One of the reasons for society's refusal to regulate adultery is that the state is seen as invading the personal space of its own citizens and those who agree are of the opinion that the Indonesian nation is a civilized nation, enlightened by religious, moral, social norms and customs.<sup>2</sup>

The word "Susila" means: good manners, civilized, polite, orderly. The word "Susila" in English is moral, ethics, decent. These words are usually translated differently. The word moral is translated as morality, decency, while ethics is translated as decency and decent is translated as well, propriety. Both "morals", "ethics" and "law" are essentially "value perceptions" of society. Morals are considerations on the basis of good or bad while "ethics" are provisions or norms of behavior (Code of Conduct). The meaning of "decency" is related to morals and ethics that have been regulated in law. So if it is associated with a criminal act, it means it is contrary to morals or ethics or can be called behavior in relation to sexual matter (behavior related to sexual matters).<sup>3</sup> Furthermore, the term Zina which is known in Indonesian is etymologically taken from Arabic, *namely zanaa-yazni-zinaa-aan* which means *atal mar-ata min ghairi 'aqdin syar'iyyin aw milkin*, meaning having sexual intercourse with a woman without knowing the marriage contract according to the syara' or because the woman is a slave, which means sexual intercourse outside of marriage.<sup>4</sup> Adultery is generally defined as sexual intercourse between a man and a woman without legal marriage. From a moral perspective, this act is very dirty (not

<sup>2</sup>Bdk. Putu Reksa Rahmayanti Pratiwi dan Sagung Putri M.E. Purwani, "Pengaturan Pertanggungjawaban Pidana Terhadap Pelaku Tindak Pidana Kumpul Kebo dalam Rancangan Kitab Undang-Undang Hukum Pidana" *Jurnal Kertha Wicara*. (11) . 03. (2022),hlm. 588-599

<sup>3</sup> Leden Marpaung, "Kejahatan Terhadap Kesusaiaan Dan Masalah Prevensinya", (Jakarta :Sinar Grafika, 2004), hlm.2-4

<sup>4</sup> Erman Sulaeman, "Delik Perzinaan Dalam Pembaharuan Hukum Pidana di Indonesia", (Walisongo Press, Semarang, 2008), hlm. 47

Criminal Act of Adultery, The Encounter Between the National ...  
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beautiful), despicable and despicable in the view of society, whereas according to religion this act is a sin.<sup>5</sup>

In the literature that the researchers found, in fact, in the Islamic religion, there is no special terminology to describe the behavior of cohabitation and incest. Or in other words, there is no special predicate to indicate the act or behavior of living together like husband and wife between a man and a woman who are not bound by a recognized marriage. In fact, the terminology that is often found to describe the above acts is adultery. However, reviewing the essential aspects of adultery, cohabitation and incest, Islamic law certainly has firm arguments for prohibiting a quo act. Because as a religion that is *rahmatan lil 'ālamīn*, Islam certainly has special attention to adultery. It is proven that one of the five special objectives of the Shari'a (*maqāṣid assyar'i*) is to protect off spring (*hifz an-nasl*).<sup>6</sup> This can only be realized with correct sexual behavior according to sharia.<sup>7</sup>

## **2. Research Methods**

This article is the result of library research, which is a specialty of normative legal research. The data sources in this article come from secondary data (primary, secondary and tertiary legal materials). The approach used is a statutory approach. Furthermore, the technical analysis used is descriptive qualitative.

## **3. Results and Discussion**

In fact, a crime of decency is a crime that is classified as a cultural crime, meaning that a crime of decency is very laden with cultural values and local wisdom. Such criminal acts will differ from one country to another that adheres to different cultures. This can be seen from the meaning of adultery that is understood by people with liberal views (the Western world), and is very different from the understanding of adultery that is held by Indonesian people. According to Western reasoning, adultery is defined as sexual intercourse in which one or both perpetrators are already married to another person. So, if sexual intercourse is carried out by people who are

<sup>5</sup> Sahran Hadziq "Pengaturan Tindak Pidana Zina Dalam Kuhp Dikaji Dari Perspektif Living Law" *Jurnal Lex Renaissance*. (1). 4. (Januari 2019),hlm 25 - 45

<sup>6</sup> Syauqi Multazam, M. Mujab "Delik Samen Leven Dalam KUHP Baru Perspektif Fikih" *Syariah Jurnal Fiqih* ,(1) 2. (December 2023), Hlm 3025-3373, lihat juga Kahar muzakir, "Zina dalam Persepektif Hukum Islam Dan KUHP ", *Formosa Journal Of Science And Technology (FJST)*, (1), 1,(Juli 2022), Hlm. 33-46

<sup>7</sup> Lisma "Internalisasi Nilai Hukum Islam Dalam Rancangan KUHP Di Indonesia (Studi Terhadap Tindak Pidana Perzinahan Dalam KUHP Dan RKUHP,) *EKSPOSE: Jurnal Penelitian Hukum Dan Pendidikan*, (18). 1, (Juni 2019),Hlm. 721-733

Criminal Act of Adultery, The Encounter Between the National ...  
( Fransiskus Saverius Nurdin, Anis Mashdurohatun & Jawade Hafidz )

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not married to each other, then it cannot be considered an act of adultery. Meanwhile, according to Muslims, adultery is sexual relations between a man and a woman who are not tied to each other in a marriage relationship, so whoever they are, if they have sexual intercourse with someone who is not their husband or wife, it is categorized as adultery.<sup>8</sup> The existence of Indonesian society is now regulated by various aspects. There are three dominant aspects in regulating the act of adultery, including the religious aspect, the cultural or customary aspect and then the legal aspect. Each of these aspects has similarities related to the statement that adultery is an act that violates human nature and should not be carried out by every human being. This illustrates that there is nothing in every aspect of life that justifies committing adultery, therefore it is appropriate for humans to avoid adulterous behavior.<sup>9</sup>

Barda Nawawi Arief, is of the view that the preparation of the National Criminal Code as a reform of criminal law must reflect a reorientation and reform of criminal law that is in accordance with the central socio-political, socio-philosophical and socio-cultural values of Indonesian society which underlie social policy, criminal policy and enforcement policy. law in Indonesia. Therefore, efforts to reform criminal law through the preparation of the National Criminal Code must be taken through both a values-oriented and a policy-oriented approach. The need to use a policy approach is because criminal law reform is only part of political or legal policy in general and part of criminal law policy in particular. Meanwhile, the value approach that must also be used is because in every policy various value must be considered.<sup>10</sup> Based on the above thoughts, the textual formulation of the article regarding adultery in the National Criminal Code can be seen. Researchers view this formulation as a result of the inertia of religious values held by the Indonesian people and cultural values. Of course, all sources of legal material must first be studied in depth so that universal values and principles can be found so that between the sources of legal material there are no longer any fundamental differences found and most importantly they also do not conflict with values. -values contained in Pancasila and the 1945 Constitution.<sup>11</sup> Furthermore, specifically in the context of the existence of religious legal values as one of the sources of material for drafting the National Criminal Code. Friedmann stated:

<sup>8</sup> Syamsul Huda "Zina Dalam Perspektif Hukum Islam Dan Kitab Undang Undang Hukum Pidana", *Hunafa :Jurnal Studi Islamika* (12). 2 (Desember 2015), hlm. 377-397

<sup>9</sup> *Ibid*

<sup>10</sup> Barda Nawawi Arief, Pembaharuan Hukum Pidana dan Masalah Kebijakan Delik Aduan, Makalah dalam Lokakarya "Pembaharuan Hukum Pidana", diselenggarakan oleh DPR-RI, Jakarta, Tanggal 29 Juni 1993.

<sup>11</sup> Mahrus Ali dan Muhammad Abdul Kholid, "Adopsi Nilai dan Prinsip Hukum Pidana Islam tentang Delik Kesiusilaan Zina dalam Kitab Undang-undang Hukum Pidana Nasional", *Jurnal Hukum IUS QUA IUSTUM* NO. 3 VOL. 30 SEPTEMBER 2023: 622 - 649

Criminal Act of Adultery, The Encounter Between the National ...  
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"The need for religious guidance is because religion can measure the true value of justice. It is the principles of religion that make justice a practical form and they only belong to religion".<sup>12</sup>

The urgency of using the basis of religious legal values is relevant to put forward because the national Criminal Code that has been formed is rooted and at the same time manifests the sense/values of justice that exist in people's lives. Meanwhile, one source of views regarding the value of societal justice is religious teachings which are integrated with the ideologies/beliefs of each religious community that are recognized in Indonesia. In this way, it is concluded that the new national criminal law has accommodated religious values.<sup>13</sup>

According to researchers, the above view is in line with the formulation regarding the offense of adultery in the national Criminal Code (Article 411, Article 412, Article 413) which is a progressive step for the state. Article 411 paragraph (1) of the National Criminal Code stipulates:

*Every person who has sexual intercourse with someone who is not their husband or wife, shall be punished for adultery, with a maximum imprisonment of 1 (one) year or a maximum fine of category II,*

Article 412 paragraph (1) of the National Criminal Code determines: *"Every person who lives together as husband and wife outside of marriage shall be punished with a maximum imprisonment of 6 (six) months or a maximum fine of category II".*

A quo article explains committing acts of adultery in a very broad sense, namely starting from the behavior of living in cohabitation/samen leven or cohabitation (living in the same house for an undetermined period of time between a man and a woman who are not bound by a valid marriage according to national law, religion, and customs. So, it is correct to say that the act of cohabitation is broader in scope than adultery.<sup>14</sup>

Article 413 of the National Criminal Code stipulates:

*"Every person who has sexual intercourse with someone who he knows is a member of his immediate family, shall be punished with imprisonment for a maximum of 10 (ten) years".*

<sup>12</sup> Friedman, Lawrence M. Legal System, The: A Social Science Perspective. Russell Sage Foundation, 1975. JSTOR, <http://www.jstor.org/stable/10.7758/9781610442282>. Accessed 29 Apr. 2024.

<sup>13</sup> Mahrus Ali dan Abdul Kholid. *Op.Cit*

<sup>14</sup> Mahrus Ali dan Abdul Kholid. *Op.Cit.*

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Researchers are of the view that sexual intercourse with family members in a quo article is like family from the mother's line or from the father's line. Apart from the polarization of views related to the formulation of the Article, the threat of criminal sanctions from the three (3) adultery provisions above, the researcher does not question it, let the polarization of views be an issue for further research. Because the focus of this article is the regulation regarding sanctions for the offense of adultery in the Criminal Code, which is revolutionary beyond the old Criminal Code (WvS).

Furthermore, the regulation of adultery in Islam, as the majority religion in Indonesia, is contained in the holy book Al-Qur'an and also As-Sunnah. Adultery in Islam has been regulated regarding prohibitions and punishments. In Islam, this is referred to as Islamic law or Islamic sharia which has binding force for Muslims.<sup>15</sup>

The following are several arguments showing the the prohibition of adultery in Islamic law *The first proposition*, the hadith of Uqbah bin Amir narrated by Bukhori-Muslim:<sup>16</sup>

"عن عقبة بن عامر أن رسول الله صلى الله عليه وسلم قال: "إيها أكابر من الرجال لا دخول على النساء إلا في بيوت أهلينها" فقال رجل من الأنصار: يا رسول الله، أفرأيت الحمو؟ قال: "الحمد لله رب العالمين"."

" Narrated from Uqbah bin Amir al-Jahni Ra. That the Messenger of Allah. said: "Do not enter women (to interact in their homes)." Then one of the men from the Ansar group said: What do you think (O Rasulullah) about the husband's relatives? The Prophet answered: "(the entry of) the husband's relatives (could cause) death!"

Hadith above, Rasulullah Saw. strictly forbids his male friends from interacting with women by entering his house. The meaning of the word *ad-dukhūl* as 'entering a woman's house to interact' is certainly based on ancient culture, where women in ancient times rarely left their homes.

The hadith above, perhaps this hadith is the one that is most similar in meaning to the term's cohabitation/samen leven. Because this hadith explicitly mentions the word *yabītanna* which means staying overnight. Namely a word that can fulfill the meaning of cohabitation itself.<sup>17</sup>

<sup>15</sup> Ibid

<sup>16</sup>Syaikh Shalih Ibn 'Abdullah Ibn Humaid and Syaikh 'Abdurrahman Ibn Muhammad Ibn 'Abdurrahman Ibn Malluh, "Nadhrat An Na'im Min Makarim Akhlaq Ar Rasul Al Karim" (Dar Al Wasilah - Saudi Arabia,1418), Hlm. 151

<sup>17</sup> Syauqi Multazam, M. Mujab *Op.Cit*

Criminal Act of Adultery, The Encounter Between the National ...  
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*Third preposition:* Another hadith that also explains the prohibition on cohabitation is the following hadith:

"لَمْ يَدْخُلْ لَنْ رَجُلٌ عَلَيْهِ مَغِيبَةٌ إِلَّا وَمَعَهُ رَجُلٌ، أَوْ رَجُلٌانِ"

*"Indeed, a man should not enter the house of a woman whose husband has left her on a trip unless she is with one or two other men".<sup>18</sup>*

Not far from the previous hadiths, the above hadith also prohibits a man from entering the house of a woman who is not his mahram. The prohibition in this hadith is again stated explicitly. This is proven by the existence of *nun taukid* in the prohibition. As is generally known, the addition of *nun taukid to a fi'il* (verb) is intended to strengthen or exaggerate the verb.<sup>19</sup>

According to Abdul Halim Hasan, zina means a man inserting his genitals into a woman's genitals, without marriage and without *subhat*.<sup>20</sup> This understanding is almost the same as the meaning put forward by Abdul Djamali, namely that adultery is the act of inserting a man's genitals up to his penis into the genitals of the desired woman.<sup>21</sup> According to fiqh scholars, the definition of adultery is inserting one's penis into a part of the body which is haram without *subhat*. And according to Ibnu Rushd, the definition of adultery is sexual intercourse committed not because of a valid marriage/quasi-marriage and not because of the ownership of a slave. Meanwhile, according to Hamka, adultery is all sexual intercourse outside of marriage, and in another *juzu'* he defines adultery as all sexual intercourse that is not legalized by marriage, or where the marriage is not valid.<sup>22</sup> The Encyclopedia of Islamic Criminal Law states the definition of adultery according to several schools of thought, which, although the editorials are different, actually means the same thing, namely sexual intercourse between a man and a woman committed by *amukallaf* who is not bound by a legal marriage.<sup>23</sup>

The punishment for committing adultery with *muḥṣan* status is stoning. Stoning is a death sentence by throwing stones.<sup>24</sup> Because the punishment of stoning is not stated clearly in the Koran, the Khawarij deny it. According to them, the punishment for *muḥṣan* adultery and

<sup>18</sup> Abu Al-Abbas Al-Qurthubi *Op.Cit.*

<sup>19</sup> Muhammad Bin Musthafa Al-Khudari, Hasyiyah Al-Khudari Ala Syarh Ibnu Dalam Syauqi Multazam, M. Mujab *Op.Cit*

20 Abdul Halim Hasan, "Tafsir AL-Ahkam", (Jakarta: Kencana, 2006), hlm. 531

21 Abdul Djamali, *Op.Cit.* hlm.198

22 Hamka, "Tafsir Al-Azhar Juz XVII", (Jakarta: Pustaka Panjimas, 1983), hlm. 4

23 Abdul Qadir Audah. "Ensiklopedi Hukum Pidana Islam". (Jakarta: Kharisma Ilmu, 2007), hlm. 154

24 Abdul Qadir Audah, *Op.Cit.* hlm. 47

Criminal Act of Adultery, The Encounter Between the National ...  
 ( Fransiskus Saverius Nurdin, Anis Mashdurohatun & Jawade Hafidz )

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*muḥṣan ghair* is the same, namely lashings. There is no article about the law of stoning in the Koran, but only based on the statement of Umar ibn Khattab who once saw the Prophet Muhammad SAW ordering the stoning of *muḥṣan*.<sup>25</sup> Umar's statement is as stated in the Prophet's decisive hadith:

*Narrated from Sayyidina Umar bin al-Khattab r.a. He said: Verily Allah has sent Muhammad Saw. with truth and has revealed to His Majesty the book of the Koran. Among those revealed to the king was a verse that touched on the law of stoning. We always read, guard and think about this verse. Rasulullah saw. have carried out the stoning sentence and after the king, we also carried out the sentence. At the end of time, I feel afraid, there will be people who will say: "We did not find the punishment of stoning in Allah's book, namely the Koran, so they will go astray because they abandon one of the obligations that has been revealed by Allah. In fact, the stoning punishment contained in the Book of Allah must be carried out on married adulterers, whether male or female, if there is clear evidence or she is pregnant or by her own admission".<sup>26</sup>*

Not different from the National Criminal Code. Punishment for legal subjects who commit adultery can be determined if they fulfill the elements of adultery with several criteria as follows:

1. having sexual intercourse outside of marriage that is legal and intentional. Sexual intercourse is considered zina at least by immersing the *hasyafah* (scrotum) in the *farji*, even if there is no erection.<sup>27</sup> Apart from that, the perpetrator also knew that the sexual intercourse they were having was haram. In the crime of adultery, male and female adulterers are required to have intentional or unlawful intent. Intentions against the law are considered fulfilled if the perpetrator knows that he is having sexual intercourse with a woman who is unlawful for him. Also, if a woman who commits adultery surrenders herself and knows that the person who has sexual intercourse with her is not lawful for her
2. The perpetrator is a *mukallaf*. Islam stipulates that every *mukallaf* can be charged with hudud punishment if they are proven to have committed adultery, regardless of whether they are married or unmarried. If a child or crazy person has sexual relations outside of marriage then it is not included in the category of adultery according to the Sharia, likewise if it is carried out by an idiot the paramedics recognize this deficiency.

<sup>25</sup> Abdul Djamali, *Op.Cit*, hlm. 199

<sup>26</sup> CD Holy Qur'an & Al-Hadis: *Kumpulan Hadis Riwayat Bukhari & Muslim*, 2002, hadis no. 997

<sup>27</sup> Abdul Qadir Audah, *op.cit*.hlm. 154

Criminal Act of Adultery, The Encounter Between the National ...  
 ( **Fransiskus Saverius Nurdin, Anis Mashdurohatun & Jawade Hafidz** )

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3. Adultery is sexual intercourse carried out in a conscious state without coercion, meaning that the perpetrators have agreed to commit adultery, not because of coercion. Forced sexual intercourse is rape. If one of the parties is forced, then he is not the perpetrator but the victim. In this rape case, the perpetrator was still sentenced to had, while the victim was not.

#### **4. Conclusion**

Standing firmly on the explanation above. Once again, this article is not comparing the threat of punishment for the crime of adultery in the Criminal Code and Islamic law. Furthermore, at the end of this article, the researcher concludes that there has been a "**confluence between the National Criminal Code and Islamic Law**". Because as far as the researcher knows, only Islam regulates in detail the act of adultery and its punishment. The encounter between the Criminal Code and Islamic law is reflected in the formulation of offenses in the Criminal Code along with the threat of sanctions. Even though the sanctions for adultery in the Criminal Code have undergone (secularization of sanctions), at least Islamic law has preceded them to provide a "foundation". The researcher can describe this encounter as follows: 1. by looking at the textual facts of the formulation of the offense of adultery in the Criminal Code which has been based on Islamic legal values. Article 411 (sexual intercourse with someone who is not the husband or wife/adultery) is substantially imbued with Islamic law in the context of *Muchsan's* terminology of zina. 2. The formulation of the offense in Article 412 of the Criminal Code (living together outside marriage/cohabitation/samen leven) is essentially imbued with the terminology of zina *ghair muhsan*. 2. In connection with the formulation of the offense in Article 413 (incest/sexual intercourse) which is substantially inspired by QS al-Nisa 4:23 which determines: "it is forbidden for you to marry your mothers, your female children, your female sisters. , your father's sisters, your brothers' daughters, your sisters' daughters." This letter is absolutely contained in the formulation of Article 413 of the National Criminal Code. Looking at the detailed regulations regarding adultery in Islamic law, researchers are of the opinion that the criminal penalties for perpetrators of adultery, cohabitation, should be increased and the offense of adultery should be changed from an absolute complaint offense to an ordinary offense. Because the offense of absolute complaint is a form of legalization of adultery. Why legalization? Based on the law, adulterous behavior cannot be punished as long as there is no complaint.

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Criminal Act of Adultery, The Encounter Between the National ...  
( **Fransiskus Saverius Nurdin, Anis Mashdurohatun & Jawade Hafidz** )

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