

MORALITY ISSUES IN THE ISLAMIC CRIMINAL LAW AND THE INDONESIAN CRIMINAL CODE DRAFT UNDER THE PERSPECTIVE OF *MAQĀSĪD AL-SHARĪ'AH*

Sanuri

Universitas Islam Negeri Sunan Ampel Surabaya | 117 A. Yani Street, Surabaya
sanuri@uinsby.ac.id

Abstract: This is a bibliographical research to highlight the moral issues in the Islamic Criminal Law and the Indonesian Criminal Code Draft, such as pornography, acts of adultery, cohabiting, prevention of pregnancy and abortion, and rape on the perspective of *maqāṣid al-sharī'ah*". The intersection between the principles of the Islamic Criminal Law and those of the Criminal Code Draft in Indonesia can be seen from a transformative relationship occurs substantively and contextually through the five features in *ḍarūriyyāt al-khamsah* of the theory of *maqāṣid al-sharī'ah*. In addition, the transformation of the two legal systems can also be measured through the three basic concepts that exist in the Islamic Criminal Law namely *zawājir* (repressive), *jawābir* (preventive), and *ta'dīb* (educative) while still pays attention to the universal values such as justice (*al-'adālah*), freedom (*al-ḥurriyyah*), equality (*al-musāwāh*), wisdom (*al-ḥikmah*), and human kindness (*maṣāliḥ al-'ibād*).

Keywords: Morality, Islamic Criminal Law, Indonesian Criminal Code Draft, *maqāṣid al-Sharī'ah*.

Introduction

Thomas Barker, an observer of morality and pornography in Indonesia, notes that the number of lovers of pornography and porno-action has increased sharply, especially after the New Order. The development of the telecommunication media and the latest information which are increasingly transparent and accessible are alleged to be the main trigger of this problem. This is

one of the biggest factors driving the proliferation of pornography and porno-action where the majority of the perpetrators are young people.

The Barker's research concludes that pornography is the root of various issues of morality and immorality in Indonesia. When pornography and porno-action have become part of the lifestyle of the Indonesian society, particularly young people, it means that the morality of the nation is being threatened. If so, Barker said, "Indonesia is in grave danger of a proxy war".¹

Along with the above phenomena, several understandings that were sown from the traditions of Western countries such as pragtism, materialism, hedonism, consumerism also colored the lifestyle of the Indonesian people. The achievements in the economic, scientific and technological sectors are often not directly proportional to the moral development of the nation. The call to return to religious doctrine is sometimes not getting enough sympathy from some people on the pretext that Indonesia is not a religious state.² As a result, the progress and development of the institutions of science and technology, on the one hand, have actually made them farther away from the noble values of the nation's heritage as the pillar of the Indonesia's culture.

Based on the official data from the National Police for the 2013-2015 period, it was stated that crime in Indonesia tended to fluctuate. In 2013, the total crime rate was around 341,000 cases. This relatively high number experienced a significant decrease, namely around 16,000 cases in 2013. So that, it became around 325,000 cases in 2014. However, the crime rate had crept up again to around 353,000 cases in 2015. The high rate of this crime related

¹ Thomas Barker, "Sex on Indonesia's Screen" within Linda Rae Bennett, *Sharyn Graham Davies, Sex and Sexualities in Contemporary Indonesia: Sexual Politics, Health, Diversity and Representation* (London and New York: Routledge, 2015), 253. See also Sonja Van Wichelen, *Religion, Politics and Gender in Indonesia: Disputing the Muslim Body* (New York: Routledge, 2010), xvi-xvii.

² Tim Lindsey, Helen Pausacker, *Religion, Law and Intolerance in Indonesia* (New York: Routledge, 2016), 20. See also Rizal Sukma, *Islam in Indonesian Foreign Policy* (London and New York: Routledge: 2003), 26.

to the risk of the population being affected by crime in the period between 2013-2015. In 2013, in every 100,000 people, an estimated 140 people were at risk of being involved in a crime. This number continued to increase to 131 people in 2014, and continued to increase to 140 people in 2015.³

Furthermore, the data of the National Socio-Economic Survey (SUSENA) also reported that the number of people who became victims of crime in Indonesia between 2013-2015 had experienced a sharp increase. In 2013, the total population who became victims of crime was a

round 2.43 million people. This number had increased in 2014 to around 2.66 million people. However, in 2015 there was a decrease to around 2.64 million people. The same thing was also reported by the Village Potential Data Collection (PODES) that crime had increased especially in the period between 2008-2014. In 2008, the villages which became the arena of mass conflict tended to increase to 2,300 villages. And in 2011, that number had increased to 2,500 villages.

The statistical data on the number of the crime rate above shows that immoral acts have reached a quite serious boundary. This kind of condition further strengthens a thesis that there are a lot of crucial problems related to morality and mentality of this nation. This phenomenon also proves that there is a big question in the Indonesian national legal system. A legal system that has not been able to accommodate the various pillar interests of the nation, or at least, lacks the power to make criminals be deterrent.

There are, of course, many factors that cause the high crime rate in Indonesia. One of them is the substance of the rules of punishment must really make the perpetrators of the crime feel deterred. Departing from this phenomenon, in the Criminal Code Draft, the problem of morality has received more attention, namely around 30 articles, from article 411 to 441.⁴ These articles deeply

³ Badan Pusat Statistik, *Statistik Kriminal 2016* (Jakarta: Badan Pusat Statistik Indonesia, 2016), iii.

⁴ Several other issues of the 2016 Criminal Code Draft are also considered to be tasteful Indonesian morals, including: (1) Article 491: "To be convicted of committing the crime of rape

regulate adultery and rape.⁵ In this research, the author analyzes issues of morality that are of serious concern in the Islamic Criminal Law and the Criminal Code Draft in Indonesia under the perspective of *maqāṣid al-sharīʿah* theory.

Basic Concept of *Maqāṣid al-Sharīʿah* as a Perspective in Islamic Law

Etymologically, *maqāṣid al-sharīʿah*⁶ consists of two words, *maqāṣid* and *sharīʿah*. The word *maqāṣid* is a plural form of the word *qaṣd* which means “intention”, “goal”, “desire”, “towards a goal”, “in the middle”, “fair and does not transcend boundaries”, “straight ahead”.⁷ These definitions are in accordance with what is stated in *al-Qurʿan*, chapter *Luqmān*, verse 19: “... and simplify your walking”. In this case, the philosophers of Islamic law or *maqāṣidiyyūn* have various meanings of the term. However, their definitions are similar, namely “direction”, “the final goal to be achieved”, “consistent with a rule”, “upholding justice”, “the attitude of taking a *tawassuṭ* or middle position”, “substantial meaning of the phenomenon”, and “the goal of all legal provisions of Islam, both in the form of order and prohibition”.⁸

with a minimum imprisonment of 3 years and a maximum of 12 years”; (2) Article 488: “Every person who lives together as husband and wife (*samen leven/kumpul kebo*) outside of a legal marriage, shall be sentenced to a maximum imprisonment of 1 year or a maximum fine of category II (Rp. 50 million)”; (3) Article 588: “For a person who helps a sick person to die (euthenasia) will be sentenced to 3 years in prison; (4) Abortion under any circumstances is a crime and carries a sentence of up to 4 years in prison. Heavier penalties are imposed on the doctor or person who has assisted in the abortion process; (5) Homosexual? The Criminal Code Draft kind of tolerates because the prohibited homosexuals are those committed by adults against children. If this extends to oral sex and anal sex, an adult male can be sentenced to 12 years in prison.

⁵ Jennifer Lindsay, “Media and Morality Pornography Post Soeharto: within Krishna Sen, David Hill, *Politics and the Media in Twenty-First Century Indonesia: Decade of Democracy* (USA and Canada: Routledge, 2011), 172-175.

⁶ Ahmad al-Raysūnī, *Naḍāriyyāt al-Maqāṣid ‘inda al-Imām al-Shātibī* (Beirut: al-Muassasah al-Jamī’iyyah li al-Dirāsah wa al-Naṣr wa al-Tawzī’, 1992), 32.

⁷ Fayrūz Abadī, *al-Qāmūs al-Muḥīṭ* (Beirut: Muassasah al-Risālah, 1987), 396.

⁸ Jasser Auda, *Maqāṣid al-Sharīʿah Daḥil li al-Mubtadi* (London: International Institute of Islamic Thought, 2008), 15.

Muḥammad Tāhir Ibn ‘Ashūr defines that *maqāṣid al-sharī‘ah* is “the intention, purpose and wisdom that are indeed desired by the *sharī‘ah* maker, Allah the Almighty, In all of His provisions to show the superiority and magnimity of the *sharī‘ah* law that are not shown in certain legal cases”.⁹ Meanwhile, Aḥmad al-Raysūnī defines *maqāṣid al-sharī‘ah* as “the goal and wisdom that are always attached to every *sharī‘ah* rules, either in the form of order or prohibition for the benefit of humans”.

Nūr al-Dīn Mukhtār al-Khādimī underlines some of the basic components that must be present in *maqāṣid al-sharī‘ah* are namely: (1) it must contain purpose, secret, and wisdom to be realized; (2) law that boils down to the provisions of the *syarī‘ah*; (3) all desired goals and secrets must lead to the value of obedience (*‘ubūdiyyah*) of human being to Allah the Almighty as the creator; (4) the purposes and secrets are in the form of benefit for human life in this world and the hereafter as well as to avoid danger and damage.¹⁰

The search for *maṣlaḥah* (benefit) in the study of Islamic law is currently experiencing rapid development. The operation of *wasāil al-maṣlaḥah* (means of benefit) is projected to be able to achieve the *aṣl al-maṣlaḥah* (fundamental benefit). Departing from these two important components, it is necessary to have an adequate explanation of *maqāṣid al-uṣūl*, namely the basic objectives to be achieved by the provisions of Islamic law itself in the form of *al-ḍarūriyyāt al-khams* (the five-basic purposes) which includes *ḥifẓ al-dīn* (keeping religion), *ḥifẓ al-naḥs* (keeping soul), *ḥifẓ al’aql* (keeping mind), *ḥifẓ al-nasl* (keep offspring), and *ḥifẓ al-māl* (keeping property).

Apart from the five features in the *maqāṣid al-sharī‘ah* above, there are also basic principles that are automatically attached to

⁹ ‘Allāl al-Fāsi, *Maqāṣid al-Sharī‘ah al-Islāmiyyah wa Makārimuhā* (Beirut: Maktabah al-Waḥdah al-‘Arabiyyah, 1963), 51.

¹⁰ Nūr al-Dīn Mukhtār al-Khādimī, *Abḥāth fī Maqāṣid al-Sharī‘ah: Dirāsah Maqāṣidiyyah Liba’ḍ Qaḍāyā al-Ijtihādī wa al-Tajdid wa al-Mu’āṣirah wa al-Fikr wa al-Ḥaḍārah wa al-Thaqāfah wa al-Manṭiq wa al-Uṣūl wa al-Furū’* (Beirut: Muassasah al-Ma’ārif li al-Ṭabā’ati wa al-Nashr: 2008), 14.

Islamic law itself. Through these basic principles, Islamic law is required to always be able to stand side by side and provide solutions to various problems arise in people's lives across time and place. The basic principles referred to are justice, freedom, equality, wisdom and goodness for humans. These universal values then become the main principles in the philosophy of Islamic law.

Morality Issues in the Islamic Criminal Law and the Criminal Code Draft in Indonesia

To facilitate understanding of the issues of morality that are happening in Indonesia from the perspective of the Islamic Criminal Law, it is necessary to explain in advance the philosophical foundations, socio-historical facts of Islamic law in Indonesia, Pancasila as an ideology and some of the latest developments in the archipelago concerning the morality of the nation including sexual immorality, rape, sexual violence, adultery and same-sex marriage.

Philosophically, Islam is a religion that has considerable attention to effort to protect the rights of every Muslim, especially those related to religion, life, property, reason, ancestry, and honor. Therefore, every criminal act committed by someone is in fact a form of violation against not only depriving the victim of human rights, but also depriving Allah the Almighty. It is for this reason that in Islamic Criminal Law, a perpetrator of crime must be punished fairly.

Socio-historically, *fiqh al-jināyah* (Islamic Criminal Law) has been in effect since the Messenger of Allah was sent to enforce Islamic law as one that does not only exist in the religious sphere but also in the public sphere. As public law, Islamic law had a binding power for all citizens at that time. As a consequence of a Muslim, imposing Islamic Criminal Law is a necessity considering that it is an inseparable part of the Muslim's life and Islam itself.

Islamic Criminal Law¹¹ is a set of legal rules aimed at “prevention” and “redemption”. As “prevention” means preventing humans from committing crimes or making amend for crimes they have committed against victims. This meaning is linear with the moral values contained in *al-Qur’an*, chapter *al-Baqarah*, verse 179: “In *qiṣāṣ* (death penalty), there is life for you, O wise people”.¹²

Starting from the Islamic Criminal Law, in general, there are three themes of the Criminal Code Draft in the last few periods, namely ideology, morality, and religion. As the central issue that has the greatest social excesses of religion in society, the three of them often become trending topics in several mainstream mass media just like fireball that continues to roll into the objects of the open debate.

The inclusion of the ideological articles is indeed not something new because the articles on the three central issues are already listed in the Criminal Code which is currently still in effect. It’s just that there is an emphasis on ideological clause, namely the prohibition of spreading all forms of the doctrine and teaching of Communism, Marxism, and Leninism. At least, there are five articles (193-197) of the Criminal Code Draft which allegedly contain these prohibitions at different levels.¹³

The Institute for Criminal Justice Reform (ICJR) stated that the Criminal Code Draft has the potential to threaten human rights. At least, there are three important points that must be attentioned, namely individual freedom, public interest, and not getting too involved in taking care of the society’s morals. This institution also considers that the articles that discuss the death penalty need to be reviewed or even deleted because it has the potential to injure the basic rights of human to live. It also adds

¹¹ Ahmad Hanafi, *Asas-Asas Hukum Pidana Islam* (Bulan bintang, Jakarta Indonesia, 1967), 1-4.

¹² Departemen Agama RI., *Al-Qur’an dan Terjemahnya* (Jakarta: PT. Listakwarta Putra, 2003), 27.

¹³ Dela Fahriana, “Banyak Pasal tentang Moral, RUU KUHP Dikecam”, dalam <https://m.tempo.co/read/news/2015/08/29/063695997/banyak-pasal-tentang-moral-ruu-kuhp-dikecam>, (January 10, 2021).

that the majority or two third of the countries in the world have stopped the death penalty on the reason that it is not in accordance with human rights.¹⁴

Still according to the Institute for Criminal Justice Reform (ICJR), the draft containing 786 articles is considered to contain many controversial articles. ICJR adds that with such a draft of the Criminal Code, the position of the state toward individuals is absolutely getting stronger. And this is a big loss for individuals who should receive full protection from the state. At least, this can be seen from many articles that show the protection, superiority and domination of the state over individual's freedom. Some of the articles in question are articles on insulting the president and vice president, articles on insulting public power, and articles on harassment of state institutions. These articles are still suspected to be similar to the subversive articles during the New Oder period.¹⁵

On the other hand, several issues of morality, that are in the spotlight, have a lot of portions or about 30 articles (411-441). These articles regulate moral issues, such as pornography, crime of adultery, cohabitation, prevention of pregnancy and abortion, and rape. Morality issues are of the particular concern in one of the big agendas of the National Criminal Code Draft. It is because according to the statistical data from several reliable sources, the number of immoral act shows a graph that tends to increase from year to year. This significant increase proves that there is a crucial problem with the morality of the Indonesian people, particularly the younger generation. This case should receive special attention from all, both government and society.

Some experts of Criminal law consider that criminal offenses in immoral cases¹⁶ are already at a high-stage and an acute level.

¹⁴ Safrezi Fitra, "Rancangan KUHP yang Akan Disahkan DPR Bertabur Pasal Kontroversial", dalam <https://katadata.co.id/berita/2019/09/20/rancangan-kuhp-yang-akan-disahkan-dpr-bertabur-pasal-kontroversial>, (Nopember 17, 2020).

¹⁵ Ibid.

¹⁶ Issues that were much debated (during the drafting of the Draft Criminal Code Version 1) were: (1) the low number of crimes imposed, and (2) the humiliation of the woman before the investigator (detailed questions were asked by male police officers) and then it was tried in court.

Therefore, it requires special attention from all components of the nation, especially the government. If not, then this is not only a threat but also quite disturbing the stability of the nation's physical and moral development. The legal experts of the past had actually been quite proportional in determining the norms and laws in their respective positions. Because not all moral rules and norms have to become legal norm. However, one of the legal characters is dynamic (*ḥarakah*).

Imam al-Shafi'i, in the book *al-Umm* vol I, narrated that the Caliph Umar Ibn al-Khaththab once had instructed the governors under his leadership to give strict punishment in the form of the death penalty for sorcerers (there are at least three cases). Regarding the policy of the Caliph, Imam al-Shafi'i commented by providing several alternatives, namely if it is proven that someone is practicing magic, it means that he or she is truly unbeliever (*kāfirun*). So that, the first alternative is ordering him or her to repent. If he or she does not want to repent, then he deserves to be punished from caning, imprisonment to death and confiscated by the state. Meanwhile, according to al-Mawardi in *al-Ḥāwī al-Kabīr*, vol 13, a person who is accused and proven of being a sorcerer must be punished according to the judge's provision.

Textually, all provisions of *jarīmah* (criminal act) in Islamic Criminal Law are different from those of the national criminal law. This is because since the beginning, there had been a difference paradigm between Islamic crime and national crime. However, substantively, the spirit of giving severe punishment for perpetrator of criminal act in the national criminal law is a kind of appreciation for legislators to hear, enter and apply articles that show the representation of the Muslim community as the majority.

In connection with this offense and the crimes that were often handed down by judges which were of a lenient nature, what was then questioned was the formulation of the rape. This is what results in the "formulation of article 490" which was very broad and "comes out" from the term "intercourse". Mardjono Reksodiputro, "Isu-Isu Moralitas dalam RUU KUHP Indonesia", dalam <http://mardjonoreksodiputro.blogspot.co.id/2015/05/beberapa-catatan-tentang-ruu-kuhp-2008.html>, (January 2, 2021).

Several other issues of the 2016 Criminal Code Draft are also considered to have a moral taste of Indonesia, including:

1. Abortion

Abortion is an activity or a legal action to end a pregnancy of someone, who has been declared medically to be pregnant, by forcibly removing a fetus or embryo in the uterus. In medical term, abortion is defined as the premature release of the product of conception in the form of a fetus, fetal membranes and placenta from the uterus. According to medical experts, such as H. Holmer, the definition of abortion is the interruption of the pregnancy before the 16th weeks, during which the placentation process has not been completed.

According to Marjorie Jeffcoat, the definition of abortion is the release of the conception before 28 weeks of gestation. It is when the fetus has not been fully mature (viable by law). Meanwhile, according to the Criminal Code, the definition of abortion is the issuance of the result of conception at each stage of its development before the pregnancy has reached the age of 38-40 weeks weighing less than 500 grams or less than 20 weeks.

In fact, the case of abortion is a classic problem that has been existing and will always be in the trajectory of the history of human life. In ancient traditions, abortion was carried out by consuming herbal medicines, using sharp objects, even by force or using traditional methods in order to cause the growth of the fetus in the womb to fail. It was done due to certain factors such as unwanted birth, baby with internal defect in womb, rape victim, weak economic condition, mother's and fetus' health and so on.¹⁷

According to data from the *Badan Kependudukan dan Keluarga Berencana Nasional* (National Population and Family Planning Agency), it is reported that in every year, there are around 2,000,000 cases of abortion occur in Indonesia. That means that about 2,000,000 lives are killed each year in a cruel and innocent

¹⁷ Ibid.

manner.¹⁸ The data from the BKKBN is similar to the data released by the World Health Organization (WHO). According to the World Health Organization (WHO), the rate of abortion in Indonesia has reached 2,000,000 cases each year.

On the other hand, death due to unsafe abortion account for 14-16% of all maternal deaths. WHO also notes that Indonesia is one of the countries to contribute the high number of abortion case in the world with a significant number, at least since the last few decades. Death, either mother or baby, resulted from abortion includes two types, namely induced abortion and spontaneous abortion.¹⁹

If we look at the number of abortion crime from year to year, it shows an increasing graph. Therefore, it is necessary to overcome it, not to say eliminating, quickly, accurately and precisely. In this case, the government interference is quite decisive. Some efforts that have officially been made by the government include conducting studies, dialogues, and revising the law by producing articles 470 and 471 of the Criminal Code Draft.

These two articles discuss about abortion in detail. Even though, the two articles are still considered to be very controversial. Some groups of people consider that these articles are not effective since they do not fulfill or are not in line with the expectations of the victims. They are also discriminative against victims of rape and women and contradict the existed health law. These two articles are spilled out of hope that abortion can, at least, be reduced.

2. Fornication

Fornication or obscenity (*ontuchtige handelingen*) in the Big Indonesian Dictionary is derived from the word “obscene” which means “dirty”, “abominable”, “disrespectful”, “indecent”, “immoral action”, “sexual immorality”. So, immoral act is all forms

¹⁸ Harsan Baharuddin, “Peningkatan Statistik Kasus Aborsi di Indonesia”, dalam <https://harsanbaharuddin.wordpress.com/2018/01/14/88/>, (November 15, 2020).

¹⁹ Ibid.

of action, whether carried out by an individual alone or by several people jointly with other people, related to the genital or other vital body parts that can trigger or stimulate sexual desire.²⁰ Fornication is a tendency to engage in sexual activity by people who have power against helpless people such as children, both men and women, accompanied by elements of violence or non-violence.

Komisi Perlindungan Anak Indonesia (The Indonesian Child Protection Commission) noted that in 2015, out of 1,726 cases of sexual abuse, there were around 58% or around 1,002 cases experienced by children. In the previous year, namely 2014, out of 3,339 cases of crime against children, 52% of that number were cases of sexual harassment. Cases of sexual abuse against children could take many forms such as sodomy, rape, incest, and several other forms of abuse like physical violence to child neglect. If the number of cases of sexual harassment in 2015 was much higher than that of in 2014, means that there was a sharp increase from year to year.

Issues related to obscene act and penalty for perpetrators of the sexual immorality are contained in the Criminal Code Draft, Article 421. This article is about penalty for perpetrators of the same-sex sexual abuse, as long as it is carried out in public, there is an element of coercion and violence, publishing pornographic content, or forcing other people to committing obscene act, then the perpetrator will get punishments, vary from 1 (one) year 6 (six) months to 9 (nine) years imprisonment.

3. Adultery

The Indonesian Online Dictionary defines adultery as: (1) the act of having sexual intercourse between a man and a woman who is not bound by a marriage relationship; (2) the act of having sexual intercourse with a man who is married to a woman who is not his wife, or a woman who is married to a man who is not her husband.

²⁰ Chazawi, Adami, *Pelajaran Hukum Pidana I* (Jakarta: Raja Grafindo Persada, 2002), 80.

Meanwhile, the definition of adultery according to the Criminal Code is the act of sexual intercourse committed by a man or woman who is married to a woman or man who is not a wife or husband. According to the Criminal Code, a person cannot be charged with a criminal act of adultery if it is committed by a single man to a single woman or in vice versa and one of the adulterers or the legal partner (wife or husband) of the adulterers does not report the act to the police.

On the other hand, the Indonesian Ulema Council (MUI) as one of the religious organizations that has high public recognition proposes that the definition of adultery in the Criminal Code Draft needs to be expanded not only for married couples but also for couples who are not yet bound in a legal marriage. Thus, the definition of adultery according to MUI is the act of sexual intercourse committed by a man or woman who is married to a woman or man who is not his wife or her husband and includes being committed by a partner who is not yet bound in a legal marriage and it has reached the requirements of adultery.

The Criminal Code Draft (RUU KUHP), which is currently being discussed at the House of Representatives of the Republic of Indonesia (DPR RI), is an effort to reduce the crime rate of adultery. There are several points in the provisions regarding adultery, including the definition of adultery, having expanded when compared to the provisions of the old Criminal Code, namely as stipulated in Article 484 Number (1) to (4), and Article 26, 27, and 29.

From the several provisions contained in Article 484 of the Criminal Code Draft above, it appears that there are additional changes to the previous provision that it is categorized as adultery if it is committed by two people who are not bound by a legal marriage, either one or both parties are already bound by a legal marriage or both are not yet tied in a legal marriage.

4. Rape

Rape is a criminal act in the form of sexual violence committed by an individual or more collectively to commit an act

of sexual intercourse in the form of penetration of the vagina or anus with the penis, other limbs such as hand, or with certain objects committed by force (accompanied by violence and threat or not), in the form of verbal violence or physical action.²¹ There are several types of rape. In term of type, the act of rape is more based on who the perpetrator is, who the victim of rape is, and what actions the perpetrator committed in the rape are. In term of type, the act of rape is divided into:

The first is rape against persons with disabilities or persons with special needs or physical disabilities. This type of rape is usually committed by healthy persons both physically and mentally on purpose. Some categories of disability are persons with special needs or has physical limitations and disorders such as delayed physical, intellectual and mental growth. With their various shortcomings and limitations, persons with disabilities do not have the ability to express their consent to engage in sexual activity and are unable to defend themselves. Rape against persons who are unconscious because of being drunk or because of sleeping, in a coma or pinching condition can be categorized as rape against persons with disabilities.

The second is rape committed by one of the family members to the other family members. This act of rape often occurs in a family, where the perpetrators and the victims are related by blood. This second type of rape is also known as incest rape. Incest rape occurs in the nuclear family, such as between father/mother to child, brother to sister, and sister to brother. It can also occur in extended families, such as between uncle/aunt to nephew or niece, cousins, grandparents and so on. This type of sexual violence is usually perpetrated by father, older sibling, and uncle with the average victims are being minors.

The third is rape against minors (statutory rape). This third rape is committed by adults against children who are still minors or children who are not yet 18 years old. This can also include

²¹ Wikipedia, "Pemeriksaan", dalam <https://id.wikipedia.org/wiki/Pemeriksaan>, (August 8, 2020).

sexual relation between minors. The legal system in Indonesia which talks about this case, specifically regulates and provides protection for victims of rape and/or sexual violence against children, is namely regulated in the Child Protection Law, Number 35 of 2014 in Article 76-D.

The fourth is rape occurs in or because of the romance relationship (rape partner). This type of rape occurs between two individuals with one man and one woman where they love one another. The prevailing laws and regulations in Indonesia do not specifically regulate this type of rape, but the act of rape in marriage is regulated in the Law on the Elimination of Domestic Violence Number 23 of 2004 Article 8 (a) and Article 66.

The fifth is rape among relatives and well-known people. This kind of rape is usually conducted by relatives or by well-known people, such as playmates, school friends, close neighbors, professional friends, co-workers. This act is also classified as rape where the perpetrators of the rape can subject to penalties in accordance with applicable provisions.

In an effort to provide education and legal assistance to the community, especially the victims of the domestic violence, *Komnas Perempuan Indonesia* (Indonesian National Commission for Women) makes annual notes that serve as the basis for their program orientation. The annual notes are launched every year at the same time to commemorate the International Women's Day on March 8. This note is made with the aim of providing an overview and information about the frequency of incidents of violence and the forms of violence, especially those experienced by Indonesian women and includes providing rehabilitation assistance to the victims of rape.

What the Indonesian National Commission for Women is doing is actually a real form of humanitarian care, especially for the victims of rape. More than that, what the Indonesian National Commission for Women is doing is a form of service to the nation, state, society, and religion as well as assisting law enforcement

officials in handling cases of rape and sexual violence against women.

Data sourced from the Indonesian National Commission for Women shows that there are six types of sexual violence that occurred throughout 2018 with various models of resolution and handling that have not fully met the expectation of the victims. Six types of sexual violence include: (1) sexual harassment; (2) sexual exploitation; (3) rape; (4) forced abortion; (5) forced contraception; (6) forced marriage. Furthermore, the findings of the Indonesian National Commission for Women in 2018-2019 was intercepting data related to act of sexual violence against women with various classifications and various ages of the victims, including:

First, in 2018, the Indonesian National Commission for Women handled approximately 406,178 cases of violence against women. This number increased significantly from the previous year, in 2017, as many as 348,466 cases of violence against women. Violence against women is one of the most frequent cases of violence in Indonesia. Of the above data, 13,568 cases had been handled by around 209 service and legal aid partner institutions spread across 34 provinces throughout Indonesia. And of the 392,610 cases, that had been handled by the Indonesian National Commission for Women, it was also sourcing from the data on cases handled by the Religious Courts as their partner.

Second, data sourced from service provider partner institutions totaled 13,568 cases that occurred from the private/personal sphere and recorded 71% or 9,637 cases, the public/community sphere as many as 3,915 cases (28%), and 16 cases in the state domain (0.1 %). Meanwhile, data from the Religious Courts amounted to 392,610 as a result of divorce which triggered violence against wives.

Third, among the data on complaints directed directly to the Indonesian National Commission for Women, there was a new case of violence against women, namely 65 cases of cyber-based violence. this year it has increased to 97 cases. Cyber crime-based violence is divided into several forms such as revenge porn by

33%, malicious distribution by 20%, cyber harassment / bullying / spamming by 15%, impersonation by 8%, cyber stalking / tracking by 7%, cyber recruitment by 4%, sexting by 3% and cyber hacking by 6%.

Analysis of *Maqāṣid al-Sharī'ah* on Morality Issues in the Islamic Criminal Law and the Indonesian Criminal Code Draft

In this sub-chapter, author discusses how the theory of *maqāṣid al-sharī'ah* can be applied and operationalized in highlighting the issues of morality contained in the Islamic Criminal Law and national criminal law by analyzing some of the existing features. such as: (1) features of *ḥifẓ al-nafs*: reducing abortion and respecting the right to life; (2) features of *ḥifẓ al-dīn*: rehabilitation of the perpetrators of fornication towards individual and social piety; (3) features of *ḥifẓ al-nasl*: adultery and rape versus the certainty of the child's lineage and psychological aspects; (4) features of *ḥifẓ al-'aql*: intellectual optimization and prohibition of consuming intoxicating goods.

1. Feature of *Ḥifẓ al-Nafs*: Reducing Abortion and Respecting the Right to Life

In the hierarchy of *maqāṣid al-sharī'ah*, *ḥifẓ al-nafs* or keeping the human's soul takes the second position after safeguarding religion. This hierarchy shows how important it is to safeguard the human's soul. Islam is a religion that highly upholds the values of spirituality, dignity, basic human rights, equality, justice, morality, brotherhood, freedom, creativity, education. These all boil down to the spirit of how to place the human's spiritual and physical safety in a basic position. These universal values in *maqāṣid al-sharī'ah* fall into the category of how to realize Islamic law in the context of the benefit for the public (*al-maqāṣid al-āmmah*).

In *al-Qur'an*, there are a lot of mentions about the prohibition of taking someone's life (killing) without any valid reasons. One of them is the word of Allah the Almighty in chapter *al-Mā'idah* verse

380: “Whoever kills a human being, not because that person (has killed) someone else, or not because he causes damage to the earth, is as if he has killed a whole human beings. And whoever maintains the life of a human being, it is as if he has taken care of all human’s lives”.²² And in *al-Qur’an* chapter *al-Takwīr* verses 8-9 it is also stated: “And when the baby girl who is buried alive is asked, for what sin she was killed”.

A leading Muslim scholar of Islamic state administration, Imam al-Mawardi said that in order for criminal acts not to occur continuously, it is necessary to have a rule that applies to a country. He further said that “*jarīmah* is a set of Islamic legal rules that contain prohibitions and threats to the perpetrators of crime, either in the form of punishment *ḥadd* or *ta’zīr*”.²³ In Islamic Criminal Law, there are also terms *jināyah* means “to reap the fruit of what someone has done” and the term *jināyah* means ‘*uqūbah* (punishment). In addition, *jināyah* is also often understood as a *jarīmah* or the criminal act in Islamic criminal law.

In a simple term, the thinking narrative through the *ḥifz al-nafs* (keeping the soul) feature is in order that the safety of the human’s soul is guaranteed, from the threat of death and threat of crime in the forms of hurting, injuring, or eliminating the function of one of the organs of the human’s body, so that Islamic law stipulates a sentence of *qiṣāṣ* for a murderer and *ḥadd* for a perpetrator of the crime of injuring. The purpose of this punishment in Islamic Criminal Law is in order that people feel deterred or even afraid to take detrimental action to others. When everyone is aware of the law and takes care of each other, then at that time, a condition of safety for the human’s soul and life has been created.

²² In Ibn Kathir’s interpretation, it is explained that “Whoever maintains a person’s life, that is, does not kill a soul that Allah has forbidden, then he has preserved the life of all human beings. See Ismail Ibn Umar Ibn Katsir, *Tafsir Al-Qur’an Al-Azhim*, Trans. Salim Bahreisy, Vol. 10 (Surabaya: Bina Ilmu, 1981), 10.

²³ Moeljatno, *Asas-Asas hukum Pidana* (Jakarta: PT Rineka Cipta, 2002), 1.

The basic character of Islamic Criminal Law,²⁴ in addition to having a compelling and firm power, is a set of legal rules that function more as “prevention” and “redeemer”. As “prevention” means preventing humans from criminal acts. This meaning is linear with the moral values contained in *al-Qur’an*, chapter *al-Baqarah*, verse 179: “In *qisās* (death penalty), there is life for you, O wise people”.²⁵ The real goal to be achieved with the *qisās* punishment is to create the life of the people in secure and peace.

This basic goal will be able to be created if a person, either as an individual or as a part of the community, realizes that hurting, injuring, removing an organ or even killing will have fatal consequences for the perpetrator, the family, and even society in general. In addition, this criminal act also results in the perpetrator can be subjected to severe punishment.

Meanwhile, as a “redeemer” means to atone for the sins of a Muslim from the punishment of Allah the Almighty on the Day of Resurrection. This deterrent effect in Islamic Criminal Law is often understood by some people as inhumane punishment and contrary to human rights. In fact, the truth is that the concept of “redeemer” contains the principle of justice and equality of humans before the law. For some Muslims, Islamic criminal punishment is considered quite rational because in fact it has the objectives of *zawājir* (causing a deterrent effect/repressive), *jawābir* (preventive), and *ta’dīb* (educative).²⁶

Moving on from the Islamic Criminal Law, in the Criminal Code Draft, Articles 470 and 471 state that every woman who

²⁴ Although many people say that *jināyah* has the same position as positive law, namely ensuring the survival of society and maintaining public interest and peace, however, there is still a significant difference between the two, namely that *sharī’ah* considers morality to be the highest foundation of society. Therefore, whoever does not heed morality has violated the norm called *jināyah*. This is what distinguishes it from positive law which completely ignores legal morality. For example, in Islamic criminal law, adultery is strictly prohibited because it is considered an immoral act. However, in positive law this action is only categorized as a criminal act if one of perpetrators feels that he or she is disadvantaged. Thus social control is very weak to eliminate the crime of adultery. See Ahmad Hanafi, *Asas-Asas Hukum Pidana Islam* (Bulan bintang, Jakarta Indonesia, 1967), 1-4.

²⁵ Departemen Agama RI., *Al-Qur’an dan Terjemahnya*, 27.

²⁶ Dede Rosyada, *Hukum Islam dan Pranata Sosial* (Jakarta: Raja Grafindo Persada, 1995), 16.

aborts or terminates her womb or asks someone else to abort or kill the womb, including all parties involved in this heinous act can be punished with imprisonment with several category: 4 (four) years, 5 (five) years, 8 (eight) years, 12 (twelve) years, and 15 (fifteen) years.

The variation of the limit of sentences stipulated in the Criminal Code Draft is actually proportional to the concept of the Islamic Criminal Law, namely *zawājir* (causing a deterrent/repressive effect), *jawābir* (preventive), and *ta'dīb* (educative).²⁷ Although many people see that the National Criminal Code has not been able to literally implement the *qiṣās* and *ḥadd* penalties as stipulated in the Islamic Criminal Law, in principle, the actual punishment for murder criminal, especially abortion, has received the same treatment and has been carried out. The different punishment implementation mechanism does not mean that Indonesia completely ignores the number of Indonesian Muslims as the majority, but it must be seen as a form of local wisdom and creativity in a legal system.

2. Feature of *Hifz al-Dīn*: Rehabilitation of the Perpetrator of Fornication towards Having Individual and Social Piety

The feature of *hifz al-dīn* is the highest pillar in *maqāṣid al-sharī'ah*. This feature necessitates a shared responsibility for Muslims to maintain the existence of Islam through two aspects, namely maintaining Islamic teachings by continuing to carry out the entire series of religious orders and prohibitions. Thus, Islam as a religion that contains teachings and invitations to humans to have an attitude of obedience to Allah the Almighty can be realized. This aspect also demands that Muslims keep and preserve all teachings while trying hard to leave things that are strictly prohibited by religion.

The second aspect is "guard and defense". This aspect places humans as hug on the one hand and as defender on the other

²⁷ Ibid.

hand. In his position as a hugger, he must always obey what he believes. Meanwhile, as a defender means that he has responsibility as a consequence of the belief he has in all of its true values. He must be willing to prevent and defend at any time if there are outsiders who want to undermine or even destroy the existence of religion. This effort is then referred to as *jihad* in a broad sense.

Therefore, all human's activities and actions that can undermine the existence of religion and destroy the prevailing norms in the public life must receive serious attention. In this case, Islam requires *qiṣāṣ* punishment for criminals in the form of murder and *ḥadd* punishment for criminals in the form of hurting or injuring other people in a way not permitted by Islam.

In the Islamic Criminal Law, there are also term of *jināyah* means "to reap the fruit of what someone has done" and the term of "*uqūbah*" (punishment). In addition, *jināyah* is also often understood as a *jarimah* or the criminal act according to Islamic Criminal Law. Imam al-Mawardi said: "*Jarimah* is a set of rules of Islamic law that contains prohibitions and threats to the perpetrators of crime, either in the form of punishment *ḥadd* or *ta'zīr*".²⁸

Whereas, in the Criminal Code Draft, the articles relating to cases of sexual harassment are mentioned in Article 421. It talks about the punishment for perpetrators of same-sex sexual immorality, as long as it is carried out in public. So everyone who commits obscene act against other people of the same gender is a maximum imprisonment of 1 (one) year and 6 (six) months or a fine, shall be punished with a maximum imprisonment of 9 (nine) years, and shall be punished with imprisonment of a maximum of 9 (nine) years.

From the explanation above, there is a meeting point between the spirit of the Islamic Criminal Law which intends to reduce crime of sexuality by providing punishment or *uqūbah* for

²⁸ Moeljatno, *Asas-Asas hukum Pidana* (Jakarta: PT Rineka Cipta, 2002), 1.

each perpetrator and the Criminal Code Draft which also aims to, at least, reduce the number of perpetrators of sexual crime. The encounter between the Islamic Criminal Law and the Criminal Code Draft is in the spirit of how to eliminate or reduce crime through punishment for the perpetrators and at the same time to provide comfort to all citizens.

Apart from the aforementioned efforts, in order to rehabilitate the perpetrators of sexual harassment crime, there are several effective and efficient approaches, namely the inculcation of spiritual values, beliefs, individual and social piety, integrity, solidarity, justice, freedom, tolerance, safety for criminals. The inculcation of the values above is a manifestation of the spirit of the Indonesian people to realize the first principle of Pancasila "God Almighty". This means that all aspects of the life of the nation, including all activities carried out by its citizens, must lead to the spirit of divinity and self-servitude to God.

To realize the values of spirituality, belief, individual and social piety, integrity, solidarity, justice, freedom, tolerance, for citizens, the roles of all components of the nation, namely the government, religious communities especially religious figures, and a legal system are needed to be able to guarantee justice and comfort. Thus, in one side, the crime can be handled fairly, and on the other hand, the psychology of the victims can be saved.

3. Feature of *Hifz al-Nasl*: Adultery and Rape versus Certainty of the Child's Lineage and Psychological Aspects

Discussion about adultery and rape cannot be separated from the process of revealing the psychological condition of the victims. As immoral acts that frequently occur in society, rape and adultery leave many problems and have not received full attention from either the government or society. Among the problems raised are social, economic, psychological, and even kinship structures.

In addition, adultery and rape also leave serious problems for the fetus and the child being conceived, such as the status of the child, the legality of the child, the future education of the child,

marginalization in social relationship and others. The problems arise as a result of this immoral act cannot be ignored because society and the state actually have a moral responsibility and have to work together to take part in handling the children as victim.

Some of the features in *maqāṣid al-sharī'ah* are *ḥifẓ al-'ird* (keeping honor) and *ḥifẓ al-naḥs* (safeguarding soul). Imām al-Ghazālī and al-Shāṭibī say that both *al-'uqūbah al-mutarattibah 'alā hadd al-'ird* (punishment for perpetrators of immoral act) in the concept of al-'Amirī and *ḥifẓ al-'ird* (maintaining honor) according to al-Juwaynī are frankly very popular in the Arabic tradition since pre-Islam.²⁹

In the perspective of *ḥifẓ al-'ird* (maintaining honor), all human beings, male or female, children or adults, have the same right and responsibility regarding honor as a human right. Rape is a violation according to some features of the objectives of Islamic law which should receive maximum retribution considering the high impact it causes. From here, it is important to include universal basic values contained in Human Rights as one of the treasures in hacking Islamic law through a process of legal *istinbat* with appropriate methodologies.

At the practical level, human dignity, especially women and children, including children resulting from adultery and victims of rape, are often at stake and even become commodities. Based on data released by the United State Embassy and Consulate in Indonesia, it is stated that Indonesia is one of the countries in the world that contributes to a high number of the case of human trafficking which mostly dominated by children and women. It should be acknowledged that in addition to the above factors, there are several factors cause human trafficking to occur, namely: (1) poverty (economic problems); (2) lack of education and information; (3) lack of parental care; and (4) rape victims, both mother and child.

²⁹ Jasser Auda, *Maqāṣid al-Sharī'ah: Dalīl li al-Mubtadi'* (Herndon, London: Al-Ma'Had al-'Alimī li al-Fikr al-Islāmī, 2011), 58.

What happened above is a form of desecration of human values and human honor that should not have happened. In this case, *maqāṣid al-sharī'ah* sees that safeguarding human soul and dignity is a noble deed and is highly emphasized in Islam. Even the main task of the Prophet Muhammad (Peace be Upon Him) is to perfect the human's morality. In the context of *maqāṣid al-sharī'ah*, case of rape and adultery, even in open places, can be approached by using universal values contained in the feature of *hifz al-nafs* (safeguarding soul), namely spirituality, glory, dignity, basic human rights, equality, justice, morality, brotherhood, freedom, creativity, education.

The Islamic Criminal Law explains that the perpetrator of rape and adultery is categorized as a great sin and deserves to be punished by *qisās*. Meanwhile, based on the National Criminal Code Draft, the perpetrator of rape and adultery is specifically regulated in Article 417 concerning adultery with imprisonment of up to 1 (one) year or a fine or imprisonment of up to 6 (six) months or a fine.

Meanwhile, specific regulations about providing protection for the victims of rape and sexual violence occur to children are specifically regulated in the Child Protection Law No. 35 of 2014 in Article 76-D and in the Law on the Elimination of Domestic Violence No. 23 of 2004 Article 8 (a) and Article 66. Of the two laws made by the government, it is a form of the government's responsibility to prevent, to execute punishment for the perpetrator of rape and sexual violence, and to handle the victims.

In the perspective of the universal values of *maqāṣid al-sharī'ah* in the form of spirituality, dignity, morality, ethics, family integrity, a sense of family responsibility, freedom of thought and action, security, education as in the concept of *maqāṣid al-sharī'ah al-'āmmah* (the universal purposes of Islamic Law), punishment and sanction for the perpetrator of rape and adultery must be measured through the following indicators: (a) performing a legal marriage, so that sexual desire is fulfilled in a legal manner; (b) safeguarding the psychology and morality of child and female as

the victims; (c) paying attention to and be responsible for the education of children and mental rehabilitation for women victims; (d) avoiding violence and trauma to children and women as the victims; e) paying attention to the balance between moral spiritual education and children's intellect; (f) fulfilling the children's needs; and (g) providing a sense of security for children and women as the victims from fear, stress, discomfort, family and social conflict.

Conclusion

Broadly speaking, there are three themes to be underlined in both the Islamic Criminal Law and the Indonesian Criminal Code Draft, namely regulating ideological, moral and religious issues. This research focuses more specifically on issues of morality like pornography, act of adultery, prevention of pregnancy or abortion, and rape.

The meeting point between the principles of the Islamic Criminal Law and the Criminal Code Draft in Indonesia in observing cases of morality from the perspective of *maqāṣid al-sharī'ah* can be seen from a transformative relationship and substantive-contextual fusion through the features contained in *ḍarūriyyāt al-khamsah* (the five basic purposes of Islamic law).

In addition, the transformation of the two legal systems can also be measured through the three basic concepts existed in the Islamic Criminal Law, namely *zawājir* (repressive), *jawābir* (preventive), and *ta'dīb* (educative) and still pays attention to the universal values such as justice (*al-'adālah*), freedom (*al-ḥurriyyah*), equality (*al-musāwāh*), wisdom (*al-ḥikmah*), and benefits for human (*maṣālīh al-'ibād*).

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