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ARTICLE HISTORY

Received: 22 January 2022

Revised: 10 May 2022

Accepted: 13 May 2022

Published: 28 May 2022

Abstract

*The purpose of this study was to examine the orientalist N.J. Coulson's point of view on the discrepancy between the doctrine of Sharia and reality in the case of adultery in the evidence of a witness. This research was qualitative in nature and employed a descriptive normative juridical technique to answer the research questions. Documenting data, conducting data analysis through reduction, presenting data and drawing conclusions were all examples of data collection techniques. With regard to the testimony of adultery, the researcher aimed to uncover and then offer evidence regarding the disagreement between Sharia doctrine and reality in order to better understand the phenomenon. Based on the findings of the study, it could be stated that Islamic Sharia is a Sharia that places a great value on human honor, and that *hifz al-'irdh* was one of the *maqashid sharia*, or honor code. With the introduction of *hifz al-'irdh*, the Islamic Criminal Law had strengthened the requirement for four witnesses to testify in an adultery case. This was also consistent with the punishment for adultery, which might range from stoning to death. However, the criticism levelled against N.J. Coulson regarding the seeming conflict between Sharia doctrine and reality in terms of the strictness of testimony was essentially incorrect, as Islamic law granted the privilege of maintaining human honor (*hifz al-'irdh*) rather than a conflict.*

Keywords: *Testimony; Islamic Criminal Law; Jarimah Zina; Adultery; Sharia Doctrine.*

INTRODUCTION

Evidence is critical when it comes to examining cases in court. It is possible to establish that a friend was incorrect in a criminal case in which he was charged. M. Yahya

Harahap explained that proof is a legal provision that contains guidelines for the procedures permitted by law and that judges can use to establish the defendant's guilt.¹ Proof is a technique or presentation of evidence used in front of a judge during a trial to persuade the judge of the truth of a criminal act.²

Article 184 paragraph 1 of the Criminal Procedure Code regulates evidence in criminal cases, stating that "legitimate evidence" includes "witness statements, expert testimony, letters, instructions, and defendant statements."³ Evidence is referred to as *al-bayyinah* in Islamic criminal law. Islamic law contains provisions defining the various types of evidence, including *syahadah* (testimony), *yamin* (oath), *iqrar* (confession), *nukul* (rejects oath), *qarinah* (indicator), and judge's conviction.⁴ In Islamic crime, proof must be 100 percent convincing; a judge is not permitted to decide a case if there is any doubt about the evidence.⁵ Numerous prophetic hadiths indicate that a judge should abstain from rendering a verdict if there is any doubt about it. In this case, judges must exercise caution when deciding cases where the conditions of proof remain uncertain.⁶

One of the frequent points of contention among Islamic jurists is the issue of adultery, particularly in terms of evidence based on witnesses. The rules regarding witnesses to adultery are quite different in Islamic criminal and positive law.⁷ In Islamic Criminal Law, witnesses to the crime of adultery must consist of four trustworthy Muslim men; if any of these witnesses are female, then two female witnesses must take the place of one male witness. Islamic criminal law, specifically, puberty, rationality, and Muslim,⁸ fair and trustworthy.⁹ Whereas in positive law, a single witness can already be used to establish a crime. Additionally, positive law makes no distinction between men and women when it comes to meeting the requirements for becoming a witness, which include "taking an oath, the witness' testimony is consistent with the criminal events he personally witnessed and experienced, and witness statements must be given in court."¹⁰

¹ M Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP* (Sinar Grafika, 2000), p. 273.

² Al Yasa' Abubakar and Iqbal Maulana, 'Alat Bukti Dan Metode Pembuktian Terhadap Tindak Pidana Zina', *LEGITIMASI: Jurnal Hukum Pidana Dan Politik Hukum*, 7.2 (2018), p 175.

³ M. Karjadi dan R. Soesilo, *Kitab Undang-Undang Hukum Acara Pidana dengan penjelasan resmi dan komentar*, (Bogor: Ploitea, 1997), p. 162

⁴ Agatha, Priandhini, and Barlinti, "Pembuktian Dan Pengesahan Anak Luar Kawin Serta Akibat Hukumnya Setelah Berlaku Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Dalam Pandangan Hukum Islam."

⁵ Haq et al., "Paraphilia Exhibitionism between Sharia and Law: A Comparative Analysis."

⁶ Naro et al., "Shariah Assessment Toward the Prosecution of Cybercrime in Indonesia."

⁷ McCloud and Abdal-Haqq, *Understanding Islamic Law: From Classical to Contemporary*.

⁸ Huda, "Zina Dalam Perspektif Hukum Islam Dan Kitab Undang Undang Hukum Pidana."

⁹ Huda et al., "Strengthening Divine Values for Self-Regulation in Religiosity: Insights from Tawakkul (Trust in God)."

¹⁰ Haq, "Pengaruh Perbedaan Keterangan Saksi Jarimah Zina (Perpektif Hukum Positif Dan Hukum Pidana Islam)."

According to an orientalist named Noel J. Coulson, the requirement of four male witnesses who are fair, Muslim, and see directly with their own eyes is an unrealistic requirement for proving adultery. Indeed, many people commit adultery but are not prosecuted due to unrealistic evidence requirements, which allows them to be released. According to N.J. Coulson, the provision of four witnesses is merely a rhetorical device that is never implemented in practice.¹¹ Coulson elucidates the tension between idealism and realism in Islamic law, demonstrating how legal doctrine differs from field practice.¹²

Coulson's statement about improbable conditions is fascinating to examine. It is necessary to take orientalist criticism of Islamic law seriously. Essentially, several Islamic law thinkers have responded to some of Coulson's observations about the conflicts that arise in Islamic law. However, these responses are still general in nature and do not address specific situations, such as the case of adultery witnesses.

Numerous studies have been conducted on the conflict between idealism and realism in Islamic law, including Hermasyah's "Conflict in Islamic Jurisprudence."¹³, Baharuddin Basettu's dissertation is titled "Conflict and Peace in Islamic Law: Idealism vs. Realism."¹⁴, Hamzah's dissertation is titled "Conflict and Tension in Islamic Law: Idealism vs. Realism." None of these studies have addressed the conflict between legal doctrine and reality on the ground when it comes to proving adultery.

METHOD

This is a qualitative study that employs a descriptive normative legal approach. Descriptive writing is a technique for methodically describing and describing the subject of research.¹⁵ This study seeks to identify and then present data regarding the conflict between legal doctrine and reality in proving the crime of adultery. Data collection techniques are carried out by means of library-research by examining several sources including the Qur'an, Hadith, laws, the Criminal Code, the Criminal Procedure Code and several other sources such as books on law, papers, journals, articles, news websites, magazines and newspaper

RESULT AND DISCUSSION

1. Proof of Zina in Islamic Criminal Law

¹¹ Coulson and Fuad, *Konflik Dalam Yurisprudensi Islam*.

¹² Elsidig, "An Examination of the Problems of Islamization of Laws: Issues in Contemporary Islamic Legal Theory."

¹³ Hermansyah, "Konflik Dalam Yurisprudensi Islam."

¹⁴ Basettu, "Konflik Dan Ketenangan Dalam Hukum Islam Antara Idealisme Dan Realisme."

¹⁵ Sunggono, *Metodologi Penelitian Hukum: Suatu Pengantar*.

Adultery, in the language, refers to sexual relations between a man and a woman on the front of the genitals that are not based on ownership or doubts about ownership.¹⁶ Zina in the term Syara means sexual relations between a man and a woman on the basis of consensual consent without marital ties. According to Abdul Halim Hasan, adultery means a man inserts his genitals into a woman's genitals, with no marriage and neither happens with subhat¹⁷.

According to Hanafiah scholars, coitus performed on the front of a woman who is still alive and voluptuous with mutual consent and while in dar al adl by a person obligated to uphold Islamic law does not have the nature of ownership, does not contain an element of doubtful ownership, and does not contain an element of doubt. marriage rope, on the other hand, does not contain an element of doubt in the form of the same condition and blurred in ownership and marriage at the same time¹⁸. Zina is defined by M. Quraish Shihab as the touching of two different types of genitals that is not governed by a marriage contract or possession and is not caused by syubhat (obscurity).¹⁹ Ibn Rushdi defined adultery as any intercourse that occurs in the absence of a valid marriage bond, not out of suspicion or ownership.²⁰

Adulterers may have muhsan status at times and may not have it at other times.²¹ A person who is Muslim, mature, intelligent, iffah, married, and has the independent status of mukallaf and has had intercourse through a legal marriage is defined as a unity muhsan.²²

Adulterers who are not married (not married) face a hundred lashings, according to Allah's word in Surah an-Nur verse 2.

Meaning:

If you believe in Allah and the hereafter, then lash the woman who commits adultery and the man who commits adultery a hundred times each, and do not have mercy on either of them, and do not allow them to prevent you from (practicing) Allah's religion, and let their punishment be witnessed by a group of believers.

¹⁶ Ibnu Abidin, *Hasyiah Ibnu Abidin* (Beirut: Dar Al Fikr, 1992), Juz 3, hlm. 154, As Syauckani, *Fath Al qadir*, (Beirut: Dar Ibnu Katsir, 1994), Juz 4, hlm. 138.

¹⁷ Abdul Halim Hasan, *Tafsir AL-Ahkam* (Jakarta: Kencana, 2006), p. 531

¹⁸ Al Kasani, *Badaai al Shanaai*, (Dar al Kubutb al Imiah: 1986), juz 7, hlm. 33

¹⁹ M. Quraish Shihab, *Tafsir al Misbah, Pesan, Kesan dan keserasian Al Quran*, Vol. 9, Cet. 9 (Jakarta: Lentera Hati, 2008), hl. 279.

²⁰ Ibnu Rusyd, *Bidayah Al Mujtahid, analisa Fiqh Para Mujtahid*, (Jakarta: Pustaka Amani, 2002), Jild. 3 hlm. 600

²¹ Supardin and Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law: Alternatives in Indonesia's Positive Legal System Reform."

²² Haq et al., "Paraphilia Exhibitionism between Sharia and Law: A Comparative Analysis."

There are various schools of thought on whether or not the punishment of exile should be administered to adulterers who are not yet muhsan.²³ Hanafiah scholars argue that exile should not be used in conjunction with the punishment of lashing, because doing so would constitute an addition to the texts.²⁴ However, a court can decide whether or not to sentence someone to exile based on the benefits and harms of doing so.²⁵

Those who commit adultery are condemned to lashes and a year of banishment to an area where they are permitted to offer qashar prayers, according to the Hanabilah scholars.²⁶ Allah's Messenger said this, and it's in agreement with that. *Take it from me, take it from me; surely, Allah has prepared a path for these women. Virgin for virgin, lashed 100 times, and exiled for one year from the hamlet. And those wedded to married people are lashed 100 times and stoned.*"

Except for some of the Khawarij and Mu'tazilah, there is no disagreement among academics from the generation of companions, the Salaf, and the renowned Imams that the punishment for a muhsan who commits adultery is stoning to death²⁷.

Scholars agree that Zina can be established by the perpetrator's confession and testimony. Certain friends regard pregnancy as proof (qarinah) of infidelity²⁸, Ibn Qayyim and other Maliki scholars hold this view. Scholars from the Hanafiyah and Syafiiyyah traditions do not employ qarinah (proof of direction) to establish the punishment for adultery.

In order to prove the finger of adultery with witness (bayyinah), there are a number of prerequisites that must be accomplished by scholars. Qur'an Surah An Nisa Verse 15 mandates the presence of four male witnesses.

Meaning:

And (against) women who do horrible acts, have four witnesses present among you (who witness it). Then, when they have testified, confine them (the women) in the house until they die or Allah provides another means.

- 1) Mukallaf is intelligent and baliq. As a result, the testimony of children and insane individuals is not accepted.
- 2) Men, women's testimony is not recognized in the case of adultery as a means of glorifying women, because adultery is a dreadful act.
- 3) To be fair, the fasiq's testimony is not accepted.

²³ Syarifah, "Zina Act Review from Islamic Law in Bandar Sinembah Village Tanjung Morawa."

²⁴ SEGAF, Ash-Shiddiqi, and Maryani, "Sanksi Pidana Adat Tentang Zina Dalam Persepektif Hukum Islam Kecamatan Pelayangan Seberang Kota Jambi."

²⁵ Haq et al., "Paraphilia Exhibitionism between Sharia and Law: A Comparative Analysis."

²⁶ Daud, "Parafilia: Nature Atau Nurture? Tinjauan Teologis Dan Psikologis."

²⁷ Abdul Qadir Audah, *Ensiklopedi Hukum Pidana Istam Jilid I* (Jakarta: Kharisma Ilmu, 2008), p. 38

²⁸ At Thuruq Al Hukmiah, hlm 97

- 4) In the case of infidelity, my slave's testimony is not accepted.
- 5) Islam, the dhimmi disbelievers' evidence cannot be recognized because their justice cannot be established.
- 6) Above-mentioned ashaalah (original) testimony is not admissible.
- 7) The four witnesses must testify to the same act, in the same location, and at the same time.

2. The Sharia Doctrine and Reality in *Jarimah Zina's* Testimony

Under its early stages of development, Islamic law was a real decision that addressed issues of the day, such as the Himariyah case during the Caliph Umar ibn Khattab's reign.²⁹ Similarly, at the time the institution was founded, the prevailing understanding of Islamic law was inextricably linked to social law practice. However, as a result of the jurisprudential debate that resulted in the theory of sources of law, the concept of shari'ah as a comprehensive and predetermined system of God's orders, a legal system that exists independently of society, emerged. Shari'ah does not emerge from society, but is determined from above for society.³⁰ As a result, the law becomes disjointed from reality and unrealistic.

Coulson then focuses on the practice of law in Islam, namely the administration of law by an Islamic state's formal courts. According to Coulson, theory and practice are inextricably linked during the early stages of law development.³¹ The law evolved from actual court rulings made during the Prophet's lifetime, the lifetimes of his successors such as Caliph Umar, and the formation of the first qadis. For instance, Imam Malik's philosophy on Islamic law, "al-Muwatta'," is predicated on the acknowledgment of actual legal practice or on the charity of the Medina populace.³² Similarly, Hanafi clerics such as Abu Yusuf were intimately connected with the practice of law during the reign of Caliph Harun ar-Rashid, since he served as Supreme Court Justice.³³

Pure legal discovery, in the form of the creation of the concept of sharia as a comprehensive and preset system of God's orders, i.e. a legal system that exists independently of society, does not arise from society but is determined from above for society. Additionally, pure Shari'ah law abstractly delegates to state authorities the

²⁹ Fakhyadi, "Patriarkisme Hukum Kewarisan Islam: Kritik Hukum Waris Islam Dan Kompilasi Hukum Islam."

³⁰ Tomkins, "The Shari'ah and Its Implications for Islamic Financial Analysis: An Opportunity to Study Interactions among Society, Organization, and Accounting."

³¹ Coulson, *A History of Islamic Law*.

³² Siregar, *Otoritarianisme Hukum Islam; Kritik Atas Hierarki Teks Al-Kutub As-Sittah*.

³³ Zunaidi, "Abu Yusuf Dan Pajak (Konsep Dalam Kitab Al-Kharaj Dan Relevansinya Dalam Ekonomi Saat Ini)."

responsibility for resolving worldly concerns and implementing existing teachings. The idealism of these medieval jurists, who preferred the role of spiritual advisor, emphasizing conscience, over that of practical case administrators, resulted in a genuine conflict between legal doctrine and legal practice, as well as a clear division between the role of the faqih and that of judges. As a result, Coulson asserts, a substantial contradiction exists between legal principles and social reality.

The disparity in the application of Islamic law became increasingly apparent throughout the late nineteenth century. Shari'ah theology has largely lost touch with the nature of society, as is the case in the Middle East. Severe punishments like as stoning for adultery, hand amputation for theft, or qishas for molestation or murder are deemed outmoded.³⁴ According to Coulson, this statute encapsulates the tribal concept of private justice. Because the traditional Muslim society's tribal structure has been virtually shattered, these laws are no longer observed.³⁵

Numerous provisions of European law are recognised in the sphere of criminal law. Substantive Shariah theology has largely lost touch with Eastern civilization in the intervening years. Numerous severe penalties for some Shari'ah-mandated offenses, such as stoning and handcuffing thieves, are considered ancient. As is the case with cases of assault ranging from physical threats to murder, which Sharia classifies as civil violations rather than criminal offenses or criminal acts. In some instances, the victim or her family has the authority to determine whether or not a person is punished. When a victim or his family is deemed guilty, they have the option of performing qisas.³⁶

The law in this case exemplifies the judicial interpretation of personal justice, which is sadly no longer frequently implemented in today's divided Muslim societies. At the moment, most Middle Eastern countries are implementing new criminal laws, demonstrating Europe's continued influence in the region. French-influenced law is used in Egypt and South-West Africa; English-influenced law is used in Sudan;³⁷ and Italian law is utilized in Libya.

In Indonesia, the Shari'ah doctrine is gradually becoming independent or integral, being incorporated into legislation, clerical fatwas, and court decisions on family law issues, marriage law, inheritance, waqf, zakat, economics, and sharia banking, as well as in areas with enforcing criminal law, such as Nangro Aceh Darussalam.³⁸

These shari'ah regulations on proof exemplify jurists' idealism. The plaintiff is responsible for supplying evidence to establish his claim, and the judge obtains a high

³⁴ Anisah, "Penerapan Hukum Qishash Untuk Menegakkan Keadilan."

³⁵ Fanani, "Perspektif Coulson Terhadap Rumusan Dialektika Hukum Islam."

³⁶ Sari, "Implementasi Hukuman Qisas Sebagai Tujuan Hukum Dalam Al-Qur'an."

³⁷ Warburg, "The Sudan, Egypt and Britain, 1899-1916."

³⁸ Ulya, "Dinamika Penerapan Hukum Jinayat Sebagai Wujud Rekonstruksi Syari'at Islam Di Aceh."

degree of certainty. Additionally, there is the idea that it is preferable to acquit the innocent than to punish the wicked.³⁹ This is where the doctrine's idealism is most evident; in circumstances of contradicting testimony, if the qadi or judge feels unable to render an accurate judgement based on the existing evidence, he is permitted to abstain from rendering a verdict.

Coulsen cites an illustration of the Sharia doctrine's idealism: in the instance of adultery, the person reporting or accusing must be able to bring in four witnesses who are: Male; Mature; Muslim; and witnessed it with his own eyes. If the accuser is unable to present four witnesses who match these criteria, the accused may self-acquit on an oath of innocence. However, is it conceivable for four qualified witnesses to observe adultery? This is completely implausible. Indeed, many parties have made errors, but their certainty has not been established because they cannot be verified, and hence refuse to swear an oath of denial.

What Coulsen said concerning *Jarimah Zina's* proof is accurate, because Proving adultery by the testimony of four witnesses who witnessed the penetration of the male genitalia into the female genitalia is nearly impossible, as it is difficult for four persons to witness the penetration of the male genitalia into the female genitalia. Even Ibn Taimyah once stated: "From the inception of Islam until his time, the finger of adultery was not established by witnesses." This notion, however, does not imply that sharia legislators enacted unenforceable legislation. The reduction in the number of witnesses in adultery is meant to "sitr" the dishonor and burden the plaintiffs, as the penalties of seeing adultery are extremely severe (100 lashes for those who are not yet married and stoning for those who are not). According to Al-Babarti in *Al-Inayah, Sharh Al-Hidaya*, the requirement of four witnesses in the adultery finger satisfies the connotation of concealing another's disgrace.

The stringent conditions for *Jarimah Zina's* testimony are also not intended to encourage immoral individuals to commit adultery, but rather to carry out one of Sharia's maqashid, hifd al ird (maintaining honor). with fabricated charges. Additionally, even if the suspect of adultery is not eligible for a had punishment because to the difficulty of obtaining four witnesses, he may be sentenced to takzir if there is a solid evidence that he committed adultery. In the worst-case scenario, even if the suspect is absolved of earthly penalty, this does not indicate that he or she is absolved of eternal punishment.

CONCLUSION

The Sharia of Islam, according to Coulson, was little more than a theory because it was never put into practice. A fundamental flaw in Coulsen's argument is that he ignores

³⁹ Samin, "Menelusuri Akar Sistem Pengawasan Penegak Hukum."

Islamic history entirely. Sharia law is not merely an idealistic concept, despite the fact that it isn't constantly and completely enforced. Coulsen's statement regarding the difficulties of proving the crime of adultery does not suggest that sharia's creators created laws that cannot be executed. *hifd al ird*, one of the Sharia's *maqashid*, mandates that the number of witnesses in an adultery finger be reduced as a "sitr" to hide shame (maintaining honor). false.

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