


# Comparison of the Legal Regulation of Adultery as Social Control in Society: A Comparison Between Indonesia, Malaysia, Brunei Darussalam, and Turkey

Ida Lestiwati<sup>1\*</sup>, Maisa<sup>2</sup>, Abdul Manan<sup>3</sup>

<sup>1,2,3</sup> Faculty of Law, Universitas Muhammadiyah Palu, Palu, Indonesia.

 : idalestiwati@yahoo.co.id  
Corresponding Author\*



## Abstract

**Introduction:** Differences in adultery regulations in various countries in the world can be different, one of which is due to the ideology adopted by each country. Regulations related to adultery actually have relevance to state ideology and the values held and lived by society, including religious values.

**Purpose of the Research:** This research aims to analyze and compare adultery regulations based on the values and ideology that apply in a country by comparing adultery regulations between Indonesia, Malaysia, Brunei Darussalam, and Turkey.

**Method of Research:** This research is normative legal research by prioritizing historical, conceptual, legislative and comparative approaches.

**Results of Research:** The results of the research confirm that the development of adultery regulations in Indonesia has not been substantively facilitated since it was regulated in the WvSNi and even passed into the Criminal Code in 1946. This is because what is regulated in the Criminal Code as an official translation of Dutch criminal law is only an overspel that if translated into Indonesian is closer to the act of infidelity and not adultery. The regulation of adultery in the new national criminal law is officially regulated in the New Criminal Code, especially in Article 411 of the New Criminal Code, which is actually in accordance with the meaning of the offense of adultery in accordance with the values and culture of Indonesian society. Differences in the regulation of adultery in each country, especially countries with a majority Muslim population. This is a necessity because differences in adultery regulations in each country depend on the ideology adopted by each country. However, in general, in societies where the majority are Muslim, adultery is classified as a disgraceful act that deserves criminal sanctions as applied in Indonesia, Malaysia and Brunei Darussalam, whereas Turkey, even though the majority of the population is Muslim, is based on a secularist view, only regulating adultery within the realm of law. private.

**Keywords:** Comparative Law; Adultery; Crime.

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## INTRODUCTION

The regulation related to adultery becomes an interesting study because it is related to the norms or legal rules of the state, the norms of decency existing in society, and religious norms. Generally, regulations related to adultery fall within these three realms of norms or rules, which can create overlapping regulations between the norms or legal rules of the state, societal norms of decency, and religious norms.<sup>1</sup> The relevance of regulations related to

<sup>1</sup> Arbanur Rasyid, "Expulsion for Adultery Perpetrators Muhshan at Panyabungan: An Islamic Law Perspective," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 55, no. 2 (2022): 265, <https://doi.org/10.14421/ajish.v56i2.1157>.

adultery in relation to the three norms or principles as stated above can also imply different formulations of adultery regulations between one country and another.<sup>2</sup>

Practice in Indonesia, for example, is based on the regulation of adultery in Article 284 of the Indonesian Criminal Code, which essentially does not discuss the concept of adultery broadly but relates to overspel or can be equated with the term of infidelity.<sup>3</sup> This confirms that in the Indonesian Criminal Code (KUHP), the regulation regarding adultery is narrowly understood as a prohibition against acts of infidelity, while a broader understanding of adultery can be resolved in accordance with prevailing societal norms of decency and religious norms.<sup>4</sup> In its development, in Indonesia after the enactment of Law No. 1 of 2023 concerning the New Criminal Code essentially affirms that regulations regarding adultery are formulated in Article 411 of the New Criminal Code, which fundamentally interprets adultery broadly, not only as mere overspel or infidelity but also including any act of intercourse carried out not with a lawful husband or wife.

The expansion of the meaning of adultery in Article 411 of the New Criminal Code is essentially aimed at accommodating the values that are developing in Indonesian society, which, based on the norms of propriety and religious norms applicable in Indonesia, adultery is a reprehensible act and needs to be specifically regulated in positive law. The expansion of the meaning of adultery in Article 411 of the New Criminal Code also aims to reinforce the "Indonesian-ness" identity in the substance of national criminal law that refers to the values and ethics of Indonesian society. Adultery cannot be interpreted as a private event left to each individual, but rather as a public domain where the state can enforce the law against it as long as it is in accordance with procedures.<sup>5</sup>

The practice of expanding the meaning of adultery as it occurs in Indonesia, with the difference in substance between the formulation of Article 284 of the Indonesian Criminal Code (KUHP) and Article 411 of the New KUHP, essentially highlights the important aspect of the values and ideology of a country having a significant influence on the formulation of regulations related to adultery. Therefore, this study seeks to analyze and compare the regulation of adultery based on the values and ideology prevailing in a country by comparing the regulation of adultery between Indonesia, Malaysia, Brunei Darussalam, and Turkey.<sup>6</sup> The selection of Malaysia and Brunei Darussalam for comparison in the regulation of adultery with Indonesia is fundamentally based on the view that Malaysia and Brunei Darussalam are "neighbors" of Indonesia, all situated in the Southeast Asian region, and they share a strong Malay cultural dominance as seen in Indonesia. Furthermore, Malaysia and Brunei Darussalam are countries predominantly Islamic in religion and with Islamic ideology enshrined in their constitutions. Turkey is chosen for comparison in relation to adultery regulation with Indonesia because Turkey is a country with a majority Muslim

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<sup>2</sup> Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (2023): 97–108.

<sup>3</sup> Iwan Satriawan and Tanto Lailam, "Open Legal Policy Dalam Putusan Mahkamah Konstitusi Dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (October 2019): 559, <https://doi.org/10.31078/jk1636>.

<sup>4</sup> Agustya Catur Mahendra, "Ambiguity of Adultery Concept (Zina) in Criminal and Justice System (A Comparison between Indonesia, Pakistan, and Turkey)," *IJCLS (Indonesian Journal of Criminal Law Studies)* 4, no. 1 (2019): 93–106, <https://doi.org/10.15294/ijcls.v4i1.19614>.

<sup>5</sup> Henny Saida Flora, "Restorative Justice in the New Criminal Code in Indonesia: A Prophetic Legal Study," *Rechtsidee* 11 (December 2022), <https://doi.org/10.21070/jjhr.v11i0.836>.

<sup>6</sup> The Guardian, "Turkey Officially Changes Name at UN to Türkiye," 2022, <https://www.theguardian.com/world/2022/jun/03/turkey-changes-name-to-turkiye-as-other-name-is-for-the-birds> (Accessed on March 12, 2024).

population, yet it prioritizes secularism, which separates religious affairs from state affairs, including the enforcement of its norms.

The comparison of adultery regulations between Indonesia, Malaysia, Brunei Darussalam, and Turkey aims to provide a comprehensive analysis of adultery regulation and its relevance to the state ideology and values embraced and internalized by the respective societies, including religious values. Research on adultery regulation, particularly in the context of criminal law, has been conducted by three previous researchers: firstly, the research by Wahyuningsih (2023), which focused on the relevance of adultery regulation between Article 411 of the New Criminal Code and Islamic Law.<sup>7</sup> The novelty of Wahyuningsih's research (2023) is that although the regulation of adultery in Article 411 of the Criminal Code remains not entirely in line with Islamic Law, it can be understood that there is an intervention or influence from Islamic Law that leads to changes in the formulation of the adultery offense in Article 411 of the New Criminal Code compared to the formulation of the adultery offense in the Criminal Code. Secondly, the research by Friwarti and Fadhlianti (2023) pertains to the formulation of adultery offenses between positive criminal law and Qanun Jinayat.<sup>8</sup> The novelty from the research of Friwarti and Fadhlianti (2023) is that adultery in the Qanun Jinayat is more complex, including zina muhsan and ghairu muhsan, and this is not facilitated in positive criminal law, especially the Indonesian Criminal Code (KUHP). Thirdly, the research conducted by Luthfiyah Trini Hastuti (2023) specifically discusses the enforcement practices of adultery laws against non-Muslims in Aceh.<sup>9</sup> The novelty of Trini Hastuti's research (2023) lies in the enforcement of adultery laws against non-Muslims, which requires a legal understanding and awareness among law enforcement officials and the general public regarding adultery and its penalties in Aceh, where Islamic Sharia law is applied. From the three previous studies related to adultery, it can be concluded that research specifically addressing the comparison of adultery regulations between Indonesia, Malaysia, Brunei Darussalam, and Turkey has not received special attention from the previous three researchers. Therefore, this research is original.

## METHODS OF THE RESEARCH

This research, which discusses the comparison of adultery regulation from a comparative legal perspective, is a normative legal research.<sup>10</sup> Normative legal research is legal research based on authoritative legal documents aimed at finding theories, concepts, and legal principles to address legal issues.<sup>11</sup> The primary legal materials in this research are: the Criminal Code, Law No. 1 of 2023 (New Criminal Code), as well as regulations related to adultery in Indonesia, Malaysia, Brunei Darussalam, and Turkey. Secondary legal materials include journal articles, books, and other literature sources specifically addressing the regulation of adultery in Indonesia, Malaysia, Brunei Darussalam, and Turkey. Non-legal materials include language dictionaries. The legal material analysis is conducted qualitatively by compiling legal materials and then carefully analyzing them to obtain a

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<sup>7</sup> Nunung Dian Wahyuningsih, "Perbandingan Hukum Perzinahan Dalam UU No. 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana (KUHP) Dengan Hukum Islam," *Journal of Law, Society, and Islamic Civilization* 11, no. 2 (2023): 98.

<sup>8</sup> Sri Dwi Friwarti and Eka Fadhlianti, "Perbandingan Sanksi Bagi Pelaku Perzinahan Menurut Kitab Undang-Undang Hukum Pidana Dan Qanun Jinayat," *At-Tasyri': Jurnal Ilmiah Prodi Muamalah* 15, no. 2 (2023): 205–24, <https://doi.org/10.47498/tasyri.v15i2.2341>.

<sup>9</sup> Luthfiyah Trini Hastuti, "Navigating Legal Boundaries: A Cross-Jurisdictional Comparison of Qanun Jinayat on Non-Muslims in Aceh and Brunei Darussalam," *Diktum: Jurnal Syariah Dan Hukum* 21, no. 2 (2023): 147–58, <https://doi.org/10.35905/diktum.v21i2.5339>.

<sup>10</sup> I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Jakarta: Kencana, 2017).

<sup>11</sup> Tunggal Ansari Setia Negara, "Normative Legal Research In Indonesia: Its Origins And Approaches," *ACLJ* 4, no. 1 (2023): 5.

legal prescription or solution. The approaches used in this research are historical, conceptual, legislative, and comparative approaches.

## RESULTS AND DISCUSSION

### A. Regulation of Adultery in Indonesia: From the Criminal Code to the New Criminal Code

The history of regulations regarding adultery in Indonesia generally should also be looked at in the context of adultery regulations as they have evolved in the *Wetboek van Strafrecht* (WvS), the Dutch East Indies Penal Code, to the New Indonesian Penal Code (KUHP Baru). It is necessary to explore the regulation of adultery in the WvS, which was the criminal law book of the Dutch East Indies era, because in fact, the Indonesian Penal Code (KUHP) is officially a translation or adaptation of the WvS from the Dutch colonial period.<sup>12</sup> This is what underlies the understanding that regulations regarding adultery should also refer to the WvS that once applied in the Dutch East Indies.

WvS historically was the Dutch criminal law code codified to facilitate public understanding of criminal law regulations and also served as a guide for law enforcement authorities in the Netherlands to enforce actions that meet the elements of delict within the WvS. In the Netherlands, WvS was enforced in 1886, and because it was already in effect, there was an orientation to enforce WvS in Dutch colonies, one of which was the Dutch East Indies, which is now known as Indonesia.<sup>13</sup> In its development, the Netherlands did not strictly apply the Dutch Penal Code (WvS) in Indonesia because there were several adjustments to criminal law regulations due to the uniqueness or specific characteristics in Dutch East Indies society, as well as the Dutch orientation to reinforce colonialism in the Dutch East Indies. Based on these arguments, the Netherlands subsequently enacted the WvSNI, which is a derivative of the WvS in the Netherlands, to be applied in the Dutch East Indies. The WvSNI itself was officially enforced in the Dutch East Indies starting from 1918.<sup>14</sup>

Regarding the regulation of adultery in the WvS (*Wetboek van Strafrecht*) or the WvSNI (*Wetboek van Strafrecht Nederlands-Indië*) itself, it is essentially governed by the term "overspel". Conceptually, overspel in Dutch terms is understood similar to adultery in Indonesian society, which generally requires that at least one of the parties has a legal bond in the form of marriage.<sup>15</sup> By way of argumentum a contrario, if the parties do not have a legal bond in the form of marriage, then it cannot be categorized as an act of overspel (adultery). The regulation of adultery in the WvSNI formulated within the overspel delict can be understood because at the time of the formulation of WvS and WvSNI, in the Netherlands itself there was a development in the form of an orientation towards liberalization, including the strengthening of the view of legal positivism with a secular character, which means that the state law must specifically separate between regulations

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<sup>12</sup> Arista Candra Irawatu, "Politik Hukum Dalam Pembaharuan Hukum Pidana (Ruu Kuhp Asas Legalitas) Arista," *Adil Indonesia Jurnal* 2, no. 1 (2019): 1–12.

<sup>13</sup> Soetandyo Wignjosebroto, *Dari Hukum Kolonial Ke Hukum Nasional* (Jakarta: HuMA, Van Vollenhoven Institute, KITLV, Epistema Institute, 2014).

<sup>14</sup> Wignjosebroto.

<sup>15</sup> Rifki Wahyudi Haris, "Act Of Settlement By Investigators Against Alleged Adultery," *Estudiante Law Journal* 3, no. 2 (2021): 309–20, <https://doi.org/10.33756/eslaj.v3i2.15822>.



made by the state and regulations made by other institutions, including religious institutions.<sup>16</sup>

The regulation of adultery in the WvSNI (Indonesian Civil Code) is clearly a positive legal regulation created by the state, aimed solely at protecting parties bound by the legal institution of marriage. The regulation of adultery in the WvSNI clearly does not accommodate the broader regulation of adultery widely embraced both sociologically and religiously by Indonesian society at that time because, in the view of the Dutch legal system at the time of the enactment of the WvSNI, regulations created by the state were prohibited from governing rules that should have been made by religious institutions.<sup>17</sup> In further development, after Indonesia declared independence in 1945, in order to fill the legal void, positive law politics were implemented by accommodating institutions or legal products from the Dutch colonial era to still be enforced post-Indonesian independence before the institutions or legal products from the Dutch colonial era were changed into new regulations.<sup>18</sup> This is essentially based on Article II of the Transitional Provisions of the 1945 Constitution before the amendments.

Accommodating institutions or legal products existing in the Dutch colonial era to still be applied in Indonesia post-independence proclamation also essentially has relevance with the principle of concordance. In general, the principle of concordance is a principle where in a newly independent country, the regulations of the former colonizing country can be temporarily applied to fill legal gaps.<sup>19</sup> The application of the principle of concordance as well as positive legal politics implies the application of WvSNI to remain in force even though Indonesia has proclaimed its independence. After Indonesia's independence, WvSNI was then replaced with the term "Kitab Undang-Undang Hukum Pidana" or commonly known as the Criminal Code (KUHP), which was generally formulated in Law No. 1 of 1946 concerning Criminal Law Regulations enacted on February 29, 1946.<sup>20</sup>

The enactment of the WvSNI (Wetboek van Strafrecht voor Nederlandsch-Indie) into the Indonesian Penal Code (KUHP), officially enforced in 1946, essentially solidified the transformation of WvSNI from a colonial legal product into a national Indonesian legal product, especially after being translated into KUHP. Officially, the Indonesian Penal Code enacted in 1946 essentially serves as the "official translation" of WvSNI.<sup>21</sup> This further emphasizes that Indonesia's criminal law, namely the Indonesian Criminal Code (KUHP), must refer to the Dutch Penal Code (WvSNI) as an "authentic" legal product. The assertion that the KUHP is an "official translation" of the WvSNI can be seen in the publication of the KUHP, which began in 1983 by the publisher Sinar Harapan in collaboration with BPHN.<sup>22</sup>

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<sup>16</sup> Wahyu Haryadi, "Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (Ruu Kuhp) Di Indonesia Perspektif Teori Pembaharuan Hukum," *Veritas* 6, no. 1 (2020): 65–78, <https://doi.org/10.34005/veritas.v6i1.566>.

<sup>17</sup> Anis Widyawati, "Criminal Policy of Adultery in Indonesia," *Journal of Indonesian Legal Studies* 5, no. 1 (2020): 171–86, <https://doi.org/10.15294/jils.v5i1.36786>.

<sup>18</sup> Abdurrakhman Alhakim, "Integral Approach To Cultural Reform: An Indonesian Criminal Justice System," *Legal Spirit* 6, no. 1 (2022): 10–17, <https://doi.org/10.31328/lis.v6i1.3650>.

<sup>19</sup> Mahendra, "Ambiguity of Adultery Concept (Zina) in Criminal and Justice System (A Comparison between Indonesia, Pakistan, and Turkey)."

<sup>20</sup> Joko Setiyono Sirejeki and Master, "Formulation of Restorative Justice Concept in Criminal Law Reform," *International Journal of Social Science Research and Review* 5, no. 1 (2022): 159–65.

<sup>21</sup> Nurul Isnina Syawalia Arifah Nasution, "Politik Hukum Pidana Kekerasan Seksual Dalam Rkuhp," *Khazanah Multidisiplin* 2, no. 1 (2021): 45–56, <https://doi.org/10.15575/km.v2i1.11636>.

<sup>22</sup> M Yanto, "Juridical Study of the Criminal Act of Defamation Article 310 Paragraph (1) of the Indonesian Criminal Law Code (KUHP) M," *Journal of Law Science* 5, no. 1 (2023): 40–52.

Further development of the term "official translation" was then removed from the publication of the Indonesian Criminal Code (KUHP) starting in 2010.

The recognition of the Indonesian Criminal Code (KUHP) as an official translation of the Dutch Criminal Code (WvSNI) actually requires special efforts, especially when it comes to translating or interpreting a crime from its original language, Dutch, into Indonesian. Difficulties in translating terms in the Dutch Criminal Code (WvSNI) into Indonesian were also expressed by J.E. Sahetapy, who is one of the important figures in translating the Dutch Criminal Code (WvSNI) into Indonesian. In J.E. Sahetapy's view, it is not easy to translate the terms of crimes in the Dutch Criminal Code (WvSNI) into Indonesian, thus requiring specific policies to be implemented.<sup>23</sup> One form of such specific policy relates to the offense of adultery regulated in the Indonesian Criminal Code (KUHP), which should not accurately be translated as "delik zina" in Indonesian language.<sup>24</sup>

The official term used by WvSNI is *overspel*, or in English, adultery. The term *overspel* or adultery cannot be equated with the term *zina* in Bahasa Indonesia. The Indonesian dictionary even emphasizes that the definition of *zina* is the act of sexual intercourse between a man and a woman outside of marriage.<sup>25</sup> This confirms that the term "zina" in the Indonesian dictionary has a broader meaning compared to the terms "overspel" or "adultery," which are closer in meaning to the term "perselingkuhan" in Indonesian. The term "overspel" or "adultery" is not translated as "zina" by the Translation Team of the Indonesian Criminal Code, but is translated as "gendak," which is commonly known, especially in Javanese, as a term indicating a relationship that betrays the bond of marriage or is equivalent to the term "perselingkuhan."<sup>26</sup> The translation of the term "overspel" or "adultery" into the term "gendak" is actually based on the view that the understanding related to adultery is inherently broad, not only related to overspel or adultery, but also includes prostitution and fornication.<sup>27</sup>

Referring to the development of adultery regulations from the WvSNI to the Criminal Code above, it can be concluded that substantive regulations on adultery have never been enforced during the period of the implementation of WvSNI until the Criminal Code. This is because what is regulated in the Criminal Code is actually the offense of "adultery," which consists of sexual relations between a man and a woman, at least one of whom is married to another party.<sup>28</sup> This further emphasizes that in Indonesia, there is no regulation specifically related to adultery, especially with the implementation of WvSNI until the Criminal Code.

Further developments regarding the regulation of adultery in Indonesia are expressly stated in the New Criminal Code. The New Criminal Code is a criminal law regulation enacted in 2023 aimed at replacing the Criminal Code. The New Criminal Code is optimally enforced throughout Indonesia starting from 2026. One important orientation in this New Criminal Code is the emphasis on regulations regarding adultery. This is because the New Criminal Code substantially emphasizes the Indonesian dimension of criminal law, so

<sup>23</sup> Normand Edwin Elnizar Muhammad Yasin, "Mereka Yang Berjasa Dalam Penerjemahan 'Resmi' KUHP" ([www.hukumonline.com](http://www.hukumonline.com), 2019), <https://www.hukumonline.com/berita/a/mereka-yang-berjasa-dalam-penerjemahan-resmi-kuhp-lt5d536a5960acc/> (Accessed on January 3, 2023).

<sup>24</sup> Muhammad Yasin.

<sup>25</sup> Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Bahasa Indonesia* (Jakarta: Departemen Pendidikan Nasional, 2008).

<sup>26</sup> Basri, "Legal Review of Adultery Crimes," *Majority Science Journal* 2, no. 1 (2024): 254–59.

<sup>27</sup> Widya Dwi Hapsoro, "The Law Enforcement against Adultery Crime Actors," *Ratio Legis Journal* 1, no. 4 (2022): 1030–37.

<sup>28</sup> Rizqi Suprayogi, "Understanding Zina Law In Indonesia (After the Ratification of the Criminal Code Bill Becomes Law Number 1 of 2023 About the Criminal Code)," *Al-Manhaj: Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 1 (2023): 291–304, <https://doi.org/10.37680/almanhaj.v5i1.2363>.

various aspects are adjusted to the aspirations and substance that align with the values recognized and embraced by Indonesian society. Specific regulations regarding adultery are stipulated in Article 411 of the New Criminal Code. There are two important aspects of regulating adultery in Article 411 of the New Criminal Code, namely<sup>29</sup>: Firstly, Article 411 of the New Penal Code adopts a broad view of adultery, meaning that adultery is defined as sexual intercourse between a man and a woman without a valid marital bond. The regulation of adultery in Article 411 of the New Penal Code can be considered as a comprehensive regulation that aligns with the understanding of adultery according to the values and culture of Indonesian society. Secondly, Article 411 of the New Penal Code asserts that adultery is a prosecutable offense, limited to the husband or wife and/or parents or children of the parties who can report the commission of adultery.

Following the enactment of the New Penal Code, the regulations regarding adultery in Indonesia can be said to substantively and comprehensively accommodate the interpretation of adultery according to the values and culture of Indonesian society. The interpretation of adultery by Indonesian society is essentially based on two perspectives: firstly, the religious perspective, where adultery is associated with actions contrary to the teachings of the prevailing religious values in Indonesia. Specifically, the interpretation of adultery by Indonesian society is influenced by the perspective of adultery in Islam, which is the majority religion in Indonesia. In Islam, adultery consists of two types: muhsan (adultery by a married person) and ghairu muhsan (adultery by an unmarried person). Muhsan adultery is substantively understood as sexual intercourse between a man and a woman, one or both of whom are already married.<sup>30</sup> Extramarital sex is a form of intercourse between a man and a woman who are not yet married. Referring to the view on adultery as in Islam above, Article 411 of the New Criminal Code essentially accommodates this view of adultery.

The specific regulation of adultery in the New Criminal Code is also a progressive step because in the Criminal Code, there is no substantive regulation regarding adultery, as what is regulated in the Criminal Code is "adultery" or criminal acts related to adultery. Aspects of adultery that are not regulated in this Criminal Code are generally often facilitated by each region in Indonesia to be subject to violations of morality according to their respective regional regulations. Regional regulations as legal products which are accumulations of agreements between regional governments and representatives of the people in the region attempt to accommodate the aspirations of the community in the region by abstractly regulating adultery offenses by formulating the substance of violations against morality.<sup>31</sup> In some regions in Indonesia with special autonomy, there are now specific regulations regarding adultery, such as in Aceh which, through the Aceh Qanun, regulates in detail the criminal act of adultery in accordance with Islamic law.

Based on the description above, it can be concluded that the development of adultery regulations in Indonesia substantively has not been facilitated, even since it was regulated in the Dutch Penal Code (WvSNI) and even until it was ratified as the Indonesian Penal Code (KUHP) in 1946. This is because what is regulated in the KUHP, as the official

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<sup>29</sup> Dhiauddin Tanjung Rizki Maulana, "Crime In Marriage : Juridical Analysis Of The Crime Of Domestic Infidelity Committed By Husbands And Mistresses," *Jurnal Hukum Samudra Keadilan* 19, no. 1 (2024): 126–35.

<sup>30</sup> Kuku Dwi Kurniawan, "Porn Videos as Evidence of Adultery: A Comparative Study of Indonesian Criminal Law and Islamic Law," *Legality: Jurnal Ilmiah Hukum* 30, no. 2 (2022): 166–81, <https://doi.org/10.22219/ljih.v30i2.20808>.

<sup>31</sup> Dicky Eko Prasetyo, "Sejarah Dan Eksistensi Pembentukan Peraturan Daerah," *Sol Justicia* 5, no. 2 (2022): 151.

translation of Dutch criminal law, only covers "overspel," which if translated into Indonesian is closer to the act of adultery than to extramarital affairs. Adultery regulations in Indonesia are instead more facilitated in regional regulations in each respective region, particularly qualified as violations of morality. Specifically in Aceh Province, specific regulations regarding adultery are governed through the Aceh Qanun, which regulates in detail the criminal act of adultery in accordance with Islamic law. The regulation of adultery in the new national criminal law is formally regulated in the New Indonesian Penal Code, particularly in Article 411, which essentially corresponds to the meaning of the adultery offense in accordance with the values and culture of Indonesian society.

## **B. Comparison of the Laws Regulating Adultery between Indonesia, Malaysia, Brunei Darussalam, and Turkey as Social Control in Society**

The regulations related to adultery essentially have the orientation of being social control for society. Social control in this context means that regulations related to adultery can serve as a means to prevent adultery from occurring in society. As a tool of social control, regulations related to adultery should also refer to the conditions and social realities of the local community.<sup>32</sup> This indicates that regulations related to adultery may vary from one country to another. One of the significant factors causing differences in regulations regarding adultery between countries is the ideological factor of a nation. Ideology can be understood as the fundamental philosophical basis of a country, which can serve as the foundation for establishing legal provisions.<sup>33</sup> This can be seen from the regulation of adultery in Indonesia, which also receives significant influence from ideological aspects. Indonesia, which is a country with the ideology of Pancasila values, essentially seeks to position itself as a religious nation state, emphasizing that within Indonesia, religious values based on religion and belief should ideally be facilitated in state law.<sup>34</sup> Although it is not a country that officially places Islam as the basis of the state, Islam plays an important role in Indonesia not only because it is adhered to by the majority of the Indonesian society, but also because the substance of Islamic Law can be facilitated and positivized through the formation of legislation at the national level.

The important role of Islamic Law in the formation of legislation is evident in the formulation of the substance of adultery in Article 411 of the New Criminal Code, which substantively accommodates provisions within Islamic Law. Although the regulation of adultery in Article 411 of the New Criminal Code has not comprehensively accommodated various provisions of adultery in accordance with Islamic Law, the regulation in Article 411 of the New Criminal Code universally accommodates the substance of Islamic Law, especially regarding the definition of adultery, that adultery can occur whether committed by parties who are already married or those without marital ties. The formulation of adultery regulation in Article 411 of the New Criminal Code, which is substantively influenced by Islamic Sharia, is inherently more progressive and accommodating to the Indonesian society's views on adultery compared to the regulation of adultery in Article 284 of the Criminal Code, which narrows the meaning of adultery to mere extramarital affairs.

<sup>32</sup> Muhammad Topan, "Adultery as a Complaint Offense in Overcoming Free Sex Behavior," *International Journal of Law, Environment, and Natural Resources* 3, no. 1 (2023): 38–45, <https://doi.org/10.51749/injurlens.v3i1.64>.

<sup>33</sup> Dicky Eko Prasetyo, "Pancasila Sebagai Pengembangan Moral Virtual Dalam Perspektif Living Ideology," *Pancasila: Jurnal Keindonesiaan* 3, no. 2 (2023): 127.

<sup>34</sup> Sinung Mufti Hangabei et al., "The Ideology of Law: Embodying the Religiosity of Pancasila in Indonesia Legal Concepts," *Law Reform* 17, no. 1 (2021): 77–94.



The accommodation of the substance of Islamic Law through the reconstruction of the term adultery in Article 411 of the New Criminal Code is actually possible in the Indonesian legal system based on Pancasila because of the accommodation of universal religious values that can serve as the basis for the formulation of positive law. However, in the Pancasila-based legal system, the accommodation of universal religious values intended for formulating positive law is aimed at facilitating the values and norms of religion prevailing in society so that the accommodation of the values of a religion in the legislation of the state can realize justice in society.<sup>35</sup> What needs to be emphasized is that the influence of Islamic law is important in formulating positive law in Indonesia, even though Islamic law rules are not comprehensively implemented absolutely through positive law made by the state. This is in line with the understanding of Pancasila's rule of law state, which asserts it is not a religious state, yet not a secular state either. The Pancasila rule of law state is a prismatic rule of law state, meaning it facilitates religious values and norms as long as those religious values and norms are relevant to be formulated within the substance of national law.<sup>36</sup>

From the description above, it can be seen that ideological factors play a significant role in formulating criminal law norms in a country. In Indonesia, for example, the Pancasila ideology embraced in Indonesia essentially has the universal capability to facilitate changes in the substance of adultery offenses in Article 411 of the New Indonesian Criminal Code, partly due to the influence of religious laws. The importance of the ideology of a country in relation to regulating adultery is also relevant for comparison with the practices of regulating adultery in other countries. Comparative law concerning the regulation of adultery in other countries is intended to compare and serve as an analytical material regarding the regulation of adultery and its formulation associated with the ideology of a country. This study aims to analyze and compare the regulation of adultery based on the values and ideologies prevailing in a country by comparing the regulation of adultery between Indonesia, Malaysia, Brunei Darussalam, and Turkey. The selection of Malaysia and Brunei Darussalam in comparing the regulation of adultery with Indonesia is based on the view that Malaysia and Brunei Darussalam are "neighbors" of Indonesia, both located in the Southeast Asian region and sharing a strong Malay cultural dominance, as in Indonesia, and Malaysia and Brunei Darussalam are countries that, besides being predominantly Islamic, also have Islamic ideologies as stated in the country's constitution. The selection of Turkey as a comparison regarding the regulation of adultery with Indonesia is because Turkey is a country with a majority of the population being Muslim but emphasizes secularism as an ideology that separates religious affairs from state affairs, including the enforcement of its norms.

The regulation of adultery in Malaysia is influenced by the Malaysian state ideology, which refers to Article 3(1) of the Malaysian Constitution, which asserts that the official religion of the state in Malaysia is Islam while ensuring followers of other religions to practice their teachings.<sup>37</sup> Ideologically, the provision that Islam is the official religion in Malaysia asserts that the legislation in Malaysia can accommodate the substance of Islamic Law as the official religion of the country, and this includes the regulation of adultery in

<sup>35</sup> Ashari Mujamil and Ali Wafa, "Relevance of Verses on Politics in the Quran With the Constitution in Indonesia; Thematic Pancasila, Uud 1945, and Controversial Articles in Criminal Code (Kuhp)," *Istinbath* 22, no. 2 (2023): 221–34, <https://doi.org/10.20414/ijhi.v22i2.549>.

<sup>36</sup> Fradhana Putra Disantara, Bayu Dwi Anggono, and A'An Efendi, "Mendudukan Norma Etika: Perspektif Teori Keadilan Bermartabat Terhadap Relasi Etika Dan Hukum," *Rechtsidee* 10, no. 2 (2022): 1–13, <https://doi.org/10.21070/jjhr.v10i0.773>.

<sup>37</sup> M. K. Bahori, A., Mat Rashid, A., Yahya, M. A., Saifuddin, S., Mat Salleh, "Evidence and Prosecution of Out-of-Wedlock Pregnancies: A Legal Perspective of Syariah Criminal Offences in Malaysia," *UMM Journal of Legal Studies* 14, no. 1 (2023): 1–30.

Malaysia. The regulation of adultery in Malaysia is primarily governed by each state individually. One example of the regulation of adultery in Malaysia is the Selangor Syariah Criminal Enactment No. 9 of 1995, which asserts that adultery is sexual intercourse between a man and a woman without the bond of marriage.<sup>38</sup> This substantiates that the regulation of adultery in Malaysia is substantively similar in defining adultery with the regulation in Article 411 of the New Penal Code. The punishment for adultery offenders is imprisonment for up to three years and/or a maximum of six strokes of the cane and/or a maximum fine of RM. 5,000.00.<sup>39</sup> If analyzed carefully, the regulation of adultery in Malaysia appears to accommodate aspects of Islamic Law, especially regarding the existence of whipping punishment. However, the substance of Islamic Law in regulating adultery in Malaysia is also not comprehensive because it does not specifically regulate the differentiation of sanctions related to zina muhsan (adultery committed by a married person) and ghairu muhsan (adultery committed by an unmarried person), which are commonly applied in Islamic Sharia.

The regulation related to adultery offenses in Brunei Darussalam is specifically governed by the Brunei Darussalam Syariah Penal Code Order 2013. Substantively, the Brunei Darussalam Syariah Penal Code Order 2013 defines adultery into two categories, namely zina muhsan and ghairu muhsan.<sup>40</sup> Adultery, substantively understood, is a form of sexual intercourse between a man and a woman, one or both of whom are already married.<sup>41</sup> "Zina ghairu muhsan" is a form of sexual intercourse between a man and a woman who are not yet married to each other.<sup>42</sup> This confirms definitively that the Brunei Darussalam Penal Code 2013 has defined adultery in accordance with Islamic law. The penalties for adultery in Brunei Darussalam are also divided into two categories: for adulterers who are muhsan (married or previously married and sexually active), the penalty is stoning to death witnessed by the public, while for adulterers who are ghairu muhsan (not married or previously married but not currently sexually active), the penalty is one hundred lashes witnessed by the public and imprisonment for one year.<sup>43</sup> This affirms that regulations concerning adultery in Brunei Darussalam are more comprehensive and in accordance with Islamic law compared to the regulations on adultery offenses in Malaysia and Indonesia. The comprehensive adultery regulations in Brunei Darussalam are essentially based on the ideological views of the state of Brunei Darussalam, which in its constitution affirms Islam as the official religion of the state, emphasizing the creed of Ahlussunnah Wal Jama'ah.<sup>44</sup> The ideological-religious aspect becomes an important aspect in the comprehensive regulation of adultery in Brunei Darussalam.

Regulations related to adultery in Turkey generally are based on the perspective of secularism, which emphasizes the need for a clear distinction between religious affairs and

<sup>38</sup> Wan Abdul Fattah Wan Ismail et al., "Keruntuhan Institusi Kekeluargaan Dan Perzinaan Remaja Muslim Di Malaysia," *Kanun Jurnal Undang-Undang Malaysia* 35, no. 1 (2023): 19–38, [https://doi.org/10.37052/kanun.35\(1\)no2](https://doi.org/10.37052/kanun.35(1)no2).

<sup>39</sup> Sudarti, "Perbandingan Hukum Pidana Perzinaan Di Malaysia Dan Brunei Darussalam," *El-Mashlahah* 11, no. 1 (2021): 78–96, <https://doi.org/10.23971/elma.v11i1.2643>.

<sup>40</sup> Sudarti.

<sup>41</sup> Kurniawan, "Porn Videos as Evidence of Adultery: A Comparative Study of Indonesian Criminal Law and Islamic Law."

<sup>42</sup> Januarsyah et al., "The Renewal Policy of the Adultery Concept in Article 411 of the Law Number 1 of 2023 on the Indonesian Criminal Code."

<sup>43</sup> Anton Minardi, Rini Afriantari, and Maesuroh Maesuroh, "The Implementation of Islamic Penal Law in Brunei Darussalam and International Society," *Socio Politica: Jurnal Ilmiah Jurusan Sosiologi* 11, no. 1 (2022): 1–9, <https://doi.org/10.15575/socio-politica.v11i1.7961>.

<sup>44</sup> Trini Hastuti, "Navigating Legal Boundaries: A Cross-Jurisdictional Comparison of Qanun Jinayat on Non-Muslims in Aceh and Brunei Darussalam."

state affairs.<sup>45</sup> In a secular state like Turkey, state affairs are considered as the private matters of individuals. The perspective of secularism in Turkey is quite intriguing because secular views are embraced by the predominantly Muslim population.<sup>46</sup> The regulations related to adultery in Turkey are classified as part of the field of family law, specifically regulated in Articles 129 – 138 of the Turkish Civil Code of 1926. In Articles 129 – 138 of the Turkish Civil Code of 1926, it is affirmed that adultery is one of the conditions that allow for divorce.<sup>47</sup> This essentially indicates that in secular countries like Turkey, adultery is not considered a punishable offense, but rather as an act betraying the marital relationship, making it one of the conditions for divorce.

Referring to the comparison of laws related to adultery between Indonesia, Malaysia, Brunei Darussalam, and Turkey, it can be concluded that the ideology of a country plays an important role in the substance of regulations related to adultery. In Turkey, which tends to be secular, adultery is not considered a crime but an act that disrespects the marital relationship, thus being one of the conditions for divorce. Additionally, in Turkey, regulations regarding adultery are also substantively included in the field of private law, particularly family law. The ideological aspect of a country contributing positively to the formulation of adultery offenses, as seen in Brunei Darussalam, is because it is an Islamic country adhering to the Ahlussunnah Wal Jama'ah creed, hence the substance of adultery offenses in Brunei Darussalam is in line with Islamic law. Although similar to Brunei Darussalam in being based on Islamic teachings, the regulation of adultery in Malaysia can be considered more moderate as it only emphasizes the broad meaning of adultery, including adultery by those who are married and those who are unmarried, but does not impose sanctions according to Islamic Sharia as in Brunei Darussalam. The influence of a country's ideological aspect in formulating regulations related to adultery also occurs in Indonesia, where although Indonesia is not a country based on a specific religion, it is not a secular country like Turkey, so it does not separate religious affairs from state affairs. In Indonesia, regulations related to adultery are formulated moderately by accommodating types of adultery, summarized in the criminal act of adultery with a category II criminal sanction.

The difference in the regulation of adultery in each country, especially countries with a majority Muslim population, is inevitable because the regulation of adultery in each country depends on the ideology embraced by each country. In Turkey, which tends to be secular, adultery is not considered a crime but an act that disrespects the marital relationship, thus being one of the conditions for divorce. Additionally, in Turkey, regulations regarding adultery are also substantively included in the field of private law, particularly family law. In Brunei Darussalam, because it is an Islamic country adhering to the Ahlussunnah Wal Jama'ah creed, the substance of adultery offenses in Brunei Darussalam is in line with Islamic law. In Malaysia, although similar to Brunei Darussalam in being based on Islamic teachings, the regulation of adultery in Malaysia can be considered more moderate as it only emphasizes the broad meaning of adultery, including adultery by those who are married

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<sup>45</sup> Mohd Roslan Mohd Nor and Muhammad Khalis Ibrahim, "From Separation between State and Religion to Religion-Freeing State: The Changing Faces of Secularism in Turkey," *Indonesian Journal of Islam and Muslim Societies* 13, no. 1 (2023): 85–114, <https://doi.org/10.18326/ijims.v13i1.85-114>.

<sup>46</sup> Yashomati Ghosh and Anirban Chakraborty, "Secularism, Multiculturalism and Legal Pluralism: A Comparative Analysis Between the Indian and Western Constitutional Philosophy," *Asian Journal of Legal Education* 7, no. 1 (January 2020): 73–81, <https://doi.org/10.1177/2322005819859674>.

<sup>47</sup> Mahendra, "Ambiguity of Adultery Concept (Zina) in Criminal and Justice System (A Comparison between Indonesia, Pakistan, and Turkey)."

and those who are unmarried, but does not impose sanctions according to Islamic Sharia as in Brunei Darussalam. In Indonesia, as a country accommodating religious values and not a secular state, regulations related to adultery are formulated moderately by accommodating types of adultery, summarized in the criminal act of adultery with a category II criminal sanction.

## CONCLUSION

The development of adultery regulation in Indonesia substantively has not been facilitated even since it was regulated in the WvSNI and even until it was enacted into the Criminal Code in 1946. This is because what is regulated in the Criminal Code as the official translation of Dutch criminal law is only overspel, which if translated into Indonesian is closer to the act of adultery than to adultery itself. Adultery regulation in Indonesia is actually more facilitated in regional regulations in each region, especially qualified as violations of morality. Specifically in the province of Aceh, specific regulations regarding adultery are governed through the Aceh Qanun which meticulously regulates adultery offenses in accordance with Islamic Sharia law. Adultery regulation in the new national criminal law is officially regulated in the New Criminal Code, especially in Article 411 of the New Criminal Code, which essentially corresponds to the interpretation of adultery offenses according to the values and culture of Indonesian society. The differences in adultery regulation in each country, especially countries with a majority Muslim population, are inevitable because the differences in adultery regulation in each country depend on the ideologies embraced by each country. Nevertheless, generally, in societies where the majority are Muslims, adultery is classified as a condemnable act deserving criminal sanctions, as applied in Indonesia, Malaysia, and Brunei Darussalam, while Turkey, despite its majority Muslim population, based on secularism, only regulates adultery in the realm of private law.

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