

Criminal Act of Adultery in Adat Law and Criminal Law

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Adultery is a form of misconduct in which a man and woman engage in sexual relations without being married. Fornication refers to sexual relations between a man and woman who are not married to each other, and if one or both are already married, it can be punished under adat law and criminal law.

If fornication is committed by one or both individuals who are already married, it is wrong and regulated by the Criminal Code. Article 284, paragraph (2) of the code states that prosecution can only occur if the spouse who has been wronged files a complaint. This must be done within three months, along with a request for divorce or separation.

Regarding fornication between unmarried individuals, it is not subject to the provisions of the Criminal Code, as it is done with mutual consent. However, there have been cases where a judge has considered it to be adultery when an unmarried man and woman engage in sexual relations, due to a breach of promise. This is because the man had promised to marry the woman but did not follow through, leading to a sense of deception.

In adat law, fornication committed by individuals who are already married can result in sanctions such as being ostracized or expelled from the indigenous community. The Lampung custom, for example, requires a trial with witnesses and evidence, with the offender being required to pay a fine. The Minangkabau tradition, on the other hand, imposes the penalty of death.

Adat law emphasizes the gravity of fornication, as it undermines the integrity of the indigenous community. Sanctions given under adat law have legal force and are like those under the Criminal Code, as they are based on decisions made by indigenous leaders. However, the criminalization of adultery under the Criminal Code does not necessarily align with the values of Indonesian religious communities and the Muslim majority.

The application of criminal law in a common law system is commonly referred to as adat criminal law. Article 1(1) of the Criminal Code describes the principle of legality as *"No act can be punished unless there is a criminal provision in the existing legislation before the act is committed."* If specified, then Article 1(1) contains two things: a criminal act should be formulated/mentioned in the regulations of the laws, and regulations of this law should exist prior to the crime. Article 1(2) deviates from Article 1(1) of the Criminal Code, which reads *"If there is a change in legislation after the act is committed, the lightest rule for the defendant will be applied."*

The principle of legality states that a criminal act can be punished if there are provisions of laws and regulations that govern it. If there is no law or regulation that specifically addresses the criminal act, then such actions cannot be considered illegal. This principle provides legal certainty, but it is not in accordance with adat law. As a

result, there is a shift from the formal legality principle to the principle of material legality.

The principle of material legality is described in Article 1(3) of the Criminal Code: "*The provisions referred to in Article 1(1) of the Criminal Code do not reduce the application of the law that lives in the community, which determines that someone should be punished even though the act is not regulated in legislation.*" The law that lives in the community is adat law. Therefore, the application of adat criminal law is not based solely on the Criminal Code and legislation outside the Criminal Code, which is referred to as the material nature of illegality. The material nature of illegality is an unlawful act that is not only contained in the law (written law) but also considers the principles of unwritten law.

Criminal law recognizes adat law as a source of law when determining the verdict. Judges must consider the adat law that prevails in the community. Adat criminal law regulates stability in society and ensures justice by punishing violations and crimes. In some areas, adat criminal law still holds power as a positive source of law and is applied by the district court to replace the position of Adat Courts or Courts Swapraja.

Article 5, paragraph (3) sub b Emergency Law No. 1 Year 1951 (L.N 1951-9) explains that civil and criminal law in Swapraja regions still in force. If an act is not considered a criminal offense in the Criminal Code but is a violation according to adat law, it is punishable by a maximum of three months in prison and/or a fine of five hundred rupiahs. This is considered as a substitute punishment if the adat punishment is not followed by the convicted party.

However, sometimes adat law does not recognize an act as a criminal offense, even if it is considered one in the Criminal Code. The judge's decision may consider adat law because it describes the conscience of the indigenous people in the region. This can lead to conflict between adat law and criminal law, as the written law remains the primary source of criminal law.

In conclusion, adat law is an important source of criminal law that must be considered, but it should not undermine the written law. The application of adat law should only be done when it is consistent with the written law and conforms to the principles of justice.

Adultery, as defined under Article 284 of the Criminal Code, has a different interpretation compared to adat criminal law. According to Article 284, the act of fornication involves a person who engages in sexual activity with someone other than their valid spouse. However, adat criminal law defines adultery more broadly to include any sexual activity without a valid marriage, regardless of whether any of the parties are married or not.

In adat criminal law, the settlement of fornication cases typically starts with negotiations between the parties involved. If the negotiations fail or the culprit is caught red-handed or the woman becomes pregnant out of wedlock, a traditional adat court is held where the judges act as mediators to help the parties reach an agreement. The court proceedings are simple and efficient since the evidence of the offense is usually clear, such as the two-time warning of citizens, the pregnancy, or the public catching the offender.

The sanctions imposed by adat courts against fornication offenders aim to restore balance in the community that has been disrupted by the offense. Adat law does not recognize the existence of formal sanctions bodies, and penalties are limited to custom fines and fulfilling customary obligations. In addition, every adat court decision for adultery also requires the offenders to get married, as this is seen as a way to correct the mistake and sin they have committed, and adat law has the potential to be embraced as a religious practice by the community.

The decisions made by adat criminal law regarding adultery are recognized by law, as long as both parties have reached a peaceful resolution. If one of the parties is not satisfied with the adat decision, they can proceed to file a complaint with the police to start an investigation.

Overall, while there are some differences in the interpretation of adultery between the Criminal Code and adat criminal law, the latter serves as an important source of law in regulating social stability and resolving conflicts within indigenous communities.

To implement laws that are just and fair, the provisions of the Criminal Code on the criminal act of decency, particularly fornication, should consider the prevailing values in Indonesian society. The definition of adultery should be in accordance with the formulation of the criminal act of adultery under adat criminal law. The provisions regarding fornication that are set in the Criminal Code are a legacy of Western culture and do not fit with Indonesian culture.

The application of adat criminal law in addition to the criminal law has led to the dualism of criminal law in Indonesia, particularly in West Sumatra. However, the existence and authority of adat courts should be maintained to ensure that every crime can be prosecuted under both legal systems. This will guarantee that the application of adat law in daily life can continue to be relevant and not eroded by the changing times.

Lastly, the sanctions imposed by adat courts against perpetrators of adultery or other offenses should be considered. According to adat customs, one of the sanctions is requiring the offender to meet customary obligations, such as hosting a community gathering, and the "*penghulu adat*" may also require them to cut farm animals as a sign of apology. These sanctions contain a symbolic meaning that emphasizes the importance of the offender acknowledging their mistakes and apologizing to those who were affected by their actions.

So, in the end new forms of sanctions, such as requiring offenders to make apologies to victims, should be included in the Criminal Code. Currently, there are no legal sanctions of this kind. While perpetrators may be sentenced for their crimes, justice is not fully achieved if the offender does not offer a sincere apology to the victim. This can leave the victim feeling dissatisfied and unwilling to forgive the perpetrator.

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