

Zina in Consensual Non-Monogamous Relationships: A Comparative Legal Analysis between Indonesian and Islamic Law

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Abstract

This article critically examines the emerging practice of swinger relationships in Indonesia, analyzing its legal implications under both Indonesian criminal law and Islamic criminal law. The primary objectives are to investigate the divergent regulatory frameworks concerning adultery in the context of consensual non-monogamous relationships within Indonesian criminal law and Islamic law, the sanctions prescribed by the Indonesian Criminal Code and Islamic *hudud* law; and the scope and nature of legal protections afforded to individuals engaged in swinger practices. Employing a qualitative research design with a phenomenological approach, this study analyzes primary sources such as the Indonesian Criminal Code (KUHP) and classical Islamic jurisprudence texts, alongside secondary sources comprising scholarly articles, legal commentaries, dissertations, and expert opinions. Data collection was conducted through a systematic literature review. The findings underscore fundamental distinctions between the secular orientation of Indonesian criminal law, which criminalizes adultery only when involving at least one legally married party and requires a formal complaint for prosecution, and the religiously anchored Islamic criminal law, which categorizes *zina* as a *hudud* offense with fixed divine penalties and stringent evidentiary standards. Legal protections under Indonesian law emphasize procedural safeguards and due process rights to prevent arbitrary prosecution, whereas Islamic law prioritizes the protection of individual honor (*hifz al-'ird*) and social morality through rigorous evidentiary requirements and the prohibition of false accusations (*qazf*). Notably, Islamic legal provisions demonstrate substantive justice by exempting pregnant and nursing women from *hudud* punishments, reflecting considerations of humanity and equity. This research contributes novel insights into the complexities of harmonizing Indonesia's secular criminal legal framework with its predominant religious values, particularly in addressing consensual non-monogamous sexual conduct such as swinger practices. It highlights the tension between evolving social behaviors and entrenched legal-religious norms, thereby informing ongoing debates on legal pluralism and human rights protections in Indonesian society.

Article History

Received: 26-04-2025

Revised: 04-06-2025

Accepted: 12-07-2025

Keywords:

Consensual Non-Monogamous;
Indonesian Law;
Islamic Law;
Swinger;
Zina.



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INTRODUCTION

Sexual intercourse is an important aspect of human life that is naturally considered a basic need (Ramadhani & Santoso, 2022), both at the biological, psychological, and social levels (Hatfield et al., 2010). More deeply in the societal context, sexual relations are not only seen as a means of reproduction by humans, but also have a strong moral dimension, so that sexual behavior has always been a matter that is given legal scrutiny in it (Arnez, 2024). However, with the passage of time, globalization, and advances in information technology, there has been a shift in values and perspectives towards sexuality (Anando et al., 2024). This phenomenon is marked by the increasing amount of information available, increased freedom of expression, and the emergence of sexually deviant behaviors that move away from the general norms of society (Suramto et al., 2024).

One form of sexually deviant behavior that has begun to emerge and be discussed in public in Indonesia is swinger, which is the practice of exchanging partners for sexual intercourse with the consent of all parties involved (Isnawan, 2024). Although this is done with mutual consent, it creates controversy in society as it essentially involves sexual relations outside of a legal marriage,

and even with more than one partner which goes against accepted moral, customary and religious values (Pratiwi & Mardijono, 2024). The existence of this peculiar pragmatic sexual practice of swinger has long been challenged in Indonesian society, raising critical questions about how Indonesian positive law and Islamic law view and regulate the practice.

The phenomenon of consensual non-monogamy, popularly known as swinging, is becoming increasingly prevalent in Indonesia, even being practiced openly and organized through digital platforms. This practice refers to consensual sexual relationships between couples who mutually agree to swap partners or involve a third party in their intimate relationships. One notable case involved the revelation of a sex party organized by the couple IG and KS, who conducted swinger activities through an online forum, using social media to disseminate content and attract new members. These activities were not only driven by sexual desire but also by economic motives, as the forum was used as a platform for the commercialization of digital pornography. Between 2022 and 2024, the site recorded over 17,000 members and thousands of pornographic posts. This phenomenon indicates that swinger practices have evolved into a distinct community with a well-organized and structured system, even attempting to evade legal repercussions by using foreign domains and establishing internal forum rules (Alfitria Nefi, 2025).

A similar phenomenon was also uncovered in Batu City, East Java, when the East Java Regional Police, through Unit III Sub-Directorate IV Renakta of the Criminal Investigation Directorate, successfully raided a sex party involving partner swapping (swinger) activities at a villa. A total of 12 people, mostly married couples, were involved in this activity, which was facilitated by a man identified as SM. Through the Telegram app, SM recruited participants and charged a fee of IDR 800,000 per couple, in exchange for the venue, facilities, and refreshments during the event. Although financial gain was not the primary motive, the psychological satisfaction derived from witnessing sexual activities was the main driving force behind the perpetrators. This practice has been carried out repeatedly with various variations, such as threesomes and swinger parties. This fact indicates that deviant sexual activities conducted consciously and organized are no longer incidental but are beginning to follow a systematic and commercial pattern (Frd, 2024).

A similar phenomenon was also uncovered in Surabaya in 2018, when Sub-Directorate IV Renakta of the East Java Regional Police Criminal Investigation Directorate exposed a partner-swapping (swinger) practice facilitated by a man identified as EH. During the raid, three married couples were detained, but only EH was charged as a suspect for his role as both the initiator and facilitator of the deviant sexual activities. EH used social media platform Twitter, through accounts @ekodok87 and @pasutri94, to invite other married couples of a certain age group to participate in sex parties. Tragically, the pregnant wife was also involved in these activities. The events were held at a starred hotel, and participants were charged a fee of IDR 750,000. The evidence found was quite shocking, including cash, underwear, contraceptives, marriage certificates, and hotel transaction records. For his actions, EH was charged under Article 296 of the Criminal Code and/or Article 506 of the Criminal Code, which pertain to indecent acts and sexual exploitation that financially benefit the perpetrator. This case underscores that consensual non-monogamy is not confined to private, closed spaces but has evolved into an organized practice utilizing digital platforms (Ard, 2018).

The growing phenomenon of swinging in Indonesia not only raises legal and moral issues but also has serious psychological and social consequences for those involved. One of the main effects of this practice is an increase in anxiety and stress levels, particularly due to fears of unintended pregnancy and the risk of contracting sexually transmitted infections (STIs) such as HIV/AIDS, chlamydia, and gonorrhea. Additionally, feelings of guilt and regret that arise after engaging in deviant sexual activities often trigger emotional disorders such as depression, loss of self-worth, and deep inner conflicts, especially if the individuals involved have a strong moral or religious background. On the other hand, various factors contribute to someone choosing to engage in swinger activities. From a psychological perspective, some participants exhibit signs of addiction to pornography or have unmet sexual needs within their marital relationships. This drives them to seek

fulfillment through sexual relationships outside their lawful partners. Meanwhile, economic factors cannot be overlooked. Many individuals engage in this activity due to financial pressures, viewing swinger practices as a means to obtain material benefits. Both factors indicate that swinger practices do not exist in a vacuum but are the result of complex interactions between personal conditions and social pressures. Therefore, the urgency of this research lies in the need for a comprehensive understanding of the impacts and driving factors of swinger practices to formulate adaptive criminal policies that still uphold the moral values of Indonesian society (Pratiwi & Mardijono, 2024).

This research needs to be analyzed through a comparative approach between national criminal law and Islamic criminal law, considering that Indonesia is a country based on Pancasila, whose first principle emphasizes belief in One God. The religious values of society cannot be separated from the legal system, including in terms of morality and decency (Situmeang, 2022). The phenomenon of swinging has sparked intense debate between the principles of individual freedom and public morality norms. In this context, a comparative approach between positive criminal law and Islamic law is crucial to see how each legal system responds to the swinger phenomenon normatively and philosophically. This is even more relevant after the enactment of the new Criminal Code (KUHP) through Law Number 1 of 2023, which will come into effect in 2026. The new KUHP explicitly includes criminal provisions for adultery in Article 411. This article states that anyone who engages in sexual intercourse with a person who is not their spouse shall be punished for adultery, provided there is a complaint from the lawful spouse, parents, or children (Kusuma et al., 2023). This provision is a concrete manifestation of criminal law policy that seeks to balance the enforcement of public morality with the principle of non-intervention by the state in the private affairs of citizens. However, the existence of the new Article 411 of the Criminal Code also reflects that the state is beginning to take a more assertive stance in regulating extramarital sexual relations as a criminal offense, which was not explicitly regulated in the old Criminal Code (a colonial legacy) except in the context of adultery complaints by a husband or wife (Rara Aura Audya & Tajul Arifin, 2025).

Under Indonesian law, criminal statutes contain provisions related to *zinā*, or infidelity, as part of crimes against norms, but these are limited in scope and often do not explicitly cover consensual sexual practices outside of marriage, such as swinging (Rahantan et al., 2024). In contrast, Islamic law has a much broader understanding of *zina* which includes any sexual relationship outside of marriage, regardless of consent (Usman et al., 2021). These two legal systems have different characteristics and normative bases in understanding adultery, thus creating the need to conduct a comprehensive comparative study to explain the conceptual differences and their legal implications (Iskandar & Salam, 2022). The different approaches in different sociocultural contexts as framed by Islamic law, the Indonesian Criminal Code, and legal perspectives globally make this research important because there seems to be no end to discussing “*devian*” sexual acts that require responsive legal encouragement, yet remain grounded in moral foundations.

The swinger phenomenon has been the subject of a number of criminal law studies in Indonesia, both from a normative and criminological perspective. Several previous studies have raised this issue from the perspective of criminal responsibility and norms of decency in Indonesian positive law. Research by Reza Aditya Saputra, Uu Idjudin Solihin, and Rohendra Fathammubina focuses on the analysis of the application of Article 296 of the Indonesian Penal Code (KUHP), which regulates acts of obscenity, and examines how this provision may be applied to the practice of swinging. The primary emphasis of the study is on the criminal liability of perpetrators and the underlying factors that contribute to the occurrence of partner-swapping behaviour (Reza Saputra et al., 2024).

Furthermore, research conducted by Eko Susanto Tejo, Yeti Kurniati, and Hernawati RAS explores the criminological aspects of deviant sexual practices, including swinging, as facilitated through social media platforms. The study highlights the negative impact of information technology development and addresses both preventive and repressive efforts aimed at curbing the proliferation of such behaviors in digital spaces (Tejo et al., 2024).

Meanwhile, Nita Dewi Pratiwi and Adianto Mardijono place greater emphasis on how national criminal law responds to swinging as a form of sexual deviance, even when conducted voluntarily. The study discusses the moral norms violated by such conduct and examines the legal approaches used to hold perpetrators accountable (Pratiwi & Mardijono, 2024).

In contrast to these three studies, which are only based on the national criminal law framework, this study proposes a comparative approach by presenting the perspective of Islamic law, especially in understanding the conception of adultery in swinger practices. This study not only examines the basis of Indonesian positive criminal law relating to the obscene acts article or norms of decency, but also juxtaposes it with Islamic law as a normative legal system that has a significant position in the context of Indonesian society. With a comparative approach and normative analysis of two different legal systems, this research is expected to make a new contribution to the discourse of criminal law, especially in expanding the understanding of deviant sexual acts that arise in modern society, both from a legal-formal and moral-religious perspective. Therefore, this research has originality in the context of conceptual comparison and emphasis on the issue of *zinā* in the framework of Islamic law, which has not been the focus of previous studies.

Based on this background, this study focuses on exploring in depth the comparison between Indonesian criminal law and Islamic law regarding the phenomenon of voluntary non-monogamous relationships (swingers). The main issues to be examined in this study are: first, how Indonesian criminal law and Islamic law differ in regulating adultery in the context of consensual non-monogamous sexual relationships. Second, what legal sanctions can be applied to individuals or couples involved in swinger practices according to the provisions of Indonesian criminal law, particularly the new Criminal Code, and how do these sanctions compare to the provisions of Islamic criminal law regarding the crime of adultery? Third, what forms of legal protection can be provided, both by Indonesian criminal law and Islamic law, to individuals or couples involved in swinger relationships, including in cases of indecency, sexual exploitation, or psychological impacts arising from such practices.

METHODS

This research uses a qualitative method with a phenomenological approach. The qualitative method was chosen because it allows researchers to delve deeper into the meaning, concepts, and legal implications of voluntary non-monogamous relationships (swingers) from the perspective of Indonesian criminal law and Islamic law (Feny Rita Fiantika et al., 2022). This phenomenological approach is used to understand how adultery in the context of relationships agreed upon by both parties is constructed and interpreted by legal and religious norms, thereby providing a comprehensive picture of the matter (Abdul Fattah Nasution, 2023). This research is of a library research, meaning that all data is obtained through the study of relevant written sources. Primary data includes the Criminal Code (KUHP), as well as *fiqh* books and other Islamic legal sources. Meanwhile, secondary data consists of scientific journals, legal and religious reference books, dissertations, theses, articles, as well as opinions from legal experts and scholars relevant to the research issues being studied (Fuadi Isnawan, 2025).

The data collection technique in this research was conducted through a systematic literature review using relevant keywords such as "*zina*," "swinger," "Indonesian criminal law," and "Islamic law" across various scientific databases, including national and international journal portals. The data obtained were analyzed using qualitative content analysis techniques. The analysis process was carried out by identifying the main themes and interpreting the data inductively, without using an initial hypothesis (Fuadi Isnawan, 2025). The purpose of this analysis is to compare how Indonesian criminal law and Islamic law regulate adultery in the context of swinger relationships. Additionally, it aims to identify the forms of sanctions that can be imposed and how both legal systems provide protection and legal certainty to individuals or couples who voluntarily engage in such practices. The results of the analysis are linked to criminal law theories and the concept of legal protection for suspects in Islamic law to obtain a comprehensive and complete understanding.

RESULTS AND DISCUSSION

The Phenomenon of Consensual Non-Monogamous Relationships or Swingers

Swingers are members of heterosexual couples in committed relationships who, as a couple, have sex with other couples and/or singles. This phenomenon shows that there is an agreement between legal spouses to have sexual relations with third parties, either individuals or other couples. This phenomenon refers to voluntary sexual behavior by married couples involving third parties in intimate relationships, either together or alternately. This activity is often done on the basis of mutual consent and usually takes place in a closed community. Although in the context of the perpetrators of these activities, they consider it as part of the sexual freedom and agreement of the couple (Saraiva & Furtado da Silva, 2023).

The swinger phenomenon is not only local in nature, but has developed into a global community with similar patterns and characteristics across cultures and countries. A comparative study by Harviainen and Frank (2018) shows that swinger practices as a lifestyle are found in various Western countries such as Finland and the United States, often in the form of group events such as Group Sex Events (GSEs). The concept of “group sex” is often associated with multi-partner sexual activities within the swinger community, although not all swingers engage in such practices. The term “group sex” is even viewed as a more flexible and descriptive term than “swinger,” as it encompasses open sexual relationships that are not limited to married couples. Furthermore, in a socio-cultural context, the swinger community is known as the “liberal world,” which has its own internal norms, etiquette rules, and exchange systems among its members, both in couple relationships and in broader social interactions. In Spain, terms such as the swinger world, the liberal world, and even the horizontal world describe an alternative social space that explicitly separates itself from the “vertical” or normative mainstream world (Vaynman, 2024).

Swinging is often interpreted by its practitioners not only as a form of sexual exploration, but also as an effort to strengthen emotional bonds in their primary relationships. Frank (2019) notes that some couples adopt this lifestyle as a strategy to maintain intimacy and passion in long-term relationships, introducing variety through joint participation in sexual relationships with third parties. Swinger clubs, in this context, play a crucial role as social spaces deliberately designed to facilitate sexual interactions between individuals and couples in a structured and consensual manner. The existence of these spatially organized spaces underscores that swinging is not merely spontaneous sexual encounters but rather an activity within a specific social ecosystem governed by ethics, boundaries, and informal oversight among its members. Within this community, conventional boundaries between fidelity and sexual freedom are often renegotiated by couples, so that such practices are often considered acceptable as long as they are carried out voluntarily and without coercion (Vaynman & Harviainen, 2023). The existence of this culture indicates that swinger practices are not merely individual actions but also an organized social phenomenon with internal structures, values, and legitimacy that often conflict with national moral and legal norms, including in Indonesia.

A Comparative Examination of Legal Interpretations of Adultery in Consensual Non-Monogamous Contexts

Indonesian criminal law as an instrument of social control has the function of maintaining order and community order through the provision of special sanctions that are ultimum remedium, meaning that criminal law is used selectively and limited only in certain situations that require legal intervention. In the Criminal Code, the criminal offense of adultery is specifically regulated in Articles 284, 287, and 288, which basically only regulates extramarital sexual relations committed by perpetrators who are already bound by legal marriage (Mahendra, 2019).

Article 284 of the Criminal Code (KUHP) is a positive legal provision in Indonesia that specifically regulates the crime of adultery. The article states that “Whoever commits adultery shall be punished with a maximum imprisonment of nine months.” This shows a direct correlation

between the act of adultery and the criminal sanctions set by the state. *Zina* in this context is understood as sexual intercourse outside the bonds of lawful marriage. The act is considered a violation of the moral and legal norms prevailing in Indonesian society. With a maximum prison sentence of nine months, Article 284 of the Criminal Code emphasizes that the state takes adultery seriously as a form of violation of the law that must be dealt with in accordance with statutory provisions (Aji Nugraha & Tajul Arifin, 2024).

The provision of Article 284 of the Criminal Code states that if a man and a woman who are both unmarried have sexual intercourse outside of a legal marriage, then this cannot be categorized as adultery and cannot be subject to criminal sanctions. In other words, Article 284 directly or indirectly provides room for extramarital sexual relations between two individuals who are both not yet bound by marriage to another party (Widyawati, 2020). Article 284 paragraph (1) of the Criminal Code does not only target individuals who have been bound by marriage, but also includes parties who participate (*medeplegen*) in the criminal act of adultery, both unmarried men and women. A man who has sexual intercourse with a married woman, as referred to in Article 284 paragraph (1) letter 2 (a), is still considered a perpetrator of a criminal offense. This also applies to a woman who is the spouse of a married man. Thus, a Muslim man who is not subject to Article 27 of the *Burgerlijk Wetboek* (BW) who commits adultery with a married woman, whether a Muslim or non-Muslim woman, can still be charged with the provisions of Article 284 of the Criminal Code. Similarly, unmarried women who are involved in adultery with married men can still be subject to criminal sanctions. However, there are complications in the application of this norm when the legal subject is an individual who is not subject to BW. Henke provides a concrete illustration: when a European wife reports her husband for committing adultery with an indigenous woman, the husband is positioned as the main perpetrator (*pleger*), while the indigenous woman is a co-perpetrator (*medepleger*). However, in the opposite situation, an unmarried Muslim woman who is not subject to BW has relations with a married Muslim man, the woman cannot be punished. This shows that the application of Article 284 of the Criminal Code is not only limited by marital status, but also by the legal dualism system that separates Western and non-Western legal subjects, which creates inequality in the enforcement of criminal law against adultery in Indonesia (Januarsyah et al., 2023).

Article 284 of the Criminal Code is an absolute complaint offense, meaning that the prosecution process can only be carried out if there is a complaint from the aggrieved party, in this case the husband or wife of the perpetrator who is bound by marriage. This provision only applies if the parties concerned are subject to Article 27 of the *Burgerlijk Wetboek* (BW), and the complaint must be made within three months of knowledge of the act, in line with the grounds for filing a divorce or request for bed and table separation. If the complaint is not made within this period, or if there has been no judgment of divorce or separation of bed and board, then the legal process cannot proceed. Even if the trial has not started, the complaint can still be withdrawn. This reflects the limited and selective nature of the criminal offense of adultery in the Criminal Code, which only touches parties in a legal marriage relationship under state law. In addition, in practice, a person can only be subject to criminal sanctions, imprisonment for a maximum of one year or a maximum fine of ten million rupiah, if he/she is married and proven to have sexual intercourse with a person who is not his/her legal spouse. Therefore, unmarried individuals, even if they have consensual sexual intercourse outside of marriage, cannot be criminally charged under Article 284 of the Criminal Code. This shows that the current positive criminal law in Indonesia does not cover all forms of adultery as interpreted in religious norms and in the view of most people who uphold the value of decency (Wahyumah & Saputra, 2024).

The regulation of adultery in the Indonesian Criminal Code is actually a legacy of the Dutch legal system adopted through the *Wetboek van Strafrecht Nederlandsch-Indië* (WvSNI). In the context of WvSNI, the term used is *overspel*, which is conceptually similar to adultery in Indonesian society, which requires a legal bond in the form of marriage between at least one of the parties involved. In other words, if the parties do not have a legal marriage bond, then the act cannot

be categorized as overspel or adultery. This is in accordance with the principle of *argumentum a contrario* which emphasizes that the regulation of the criminal offense of adultery only applies to those who are legally married. Legal orientation at that time led to liberalization and enforcement of legal positivism with a secular character, where state law had to separate rules made by the state and rules made by other institutions, including religious institutions. Therefore, the regulation of adultery in the WvSNI, which became the forerunner of the Indonesian Criminal Code, aimed solely to protect the institution of marriage in state law, without accommodating the broader social and religious views in Indonesian society. After Indonesia's independence in 1945, existing positive legal rules from the Dutch colonial era remained in place to fill the legal vacuum, before being amended and adjusted to the new national regulations. This condition shows the challenge of harmonization between the secular national positive law and the religious norms adopted by the majority of Indonesian society, especially in terms of regulating adultery (Lestiawati et al., 2024).

In contrast to this approach, Islamic criminal law does not make adultery a complaint offense that requires a formal complaint from the victim or her family. *Zina* in the perspective of Islamic law is a serious violation of religious and social norms whose existence must be followed up by religious authorities or the Islamic state without waiting for a report. If the evidentiary requirements are met, such as the presence of four witnesses who witnessed the sexual intercourse directly and clearly, or there is a confession from the perpetrator four times consciously, then the *qodli* (judge) can impose a penalty as prescribed in sharia. This means that Islamic criminal law views adultery as a threat to the moral order of the community, not merely a violation of a legal spouse (Hapsoro, 2024).

In the perspective of Islamic Law, the term *zina* etymologically comes from the word *fahisyah* which means abominable and despicable acts. Terminologically, *zinā* refers to sexual relations between a man and a woman who do not have a legal marriage relationship. The scholars of *fiqh* are unanimous in defining *zinā* as the act of inserting the penis into the vagina (female genitalia) without the basis of a valid marriage and neither occurs because of a *syubhat* 'legal doubt', and is done on the basis of lust. This definition emphasizes the physical, legal and intentional aspects of adultery. Ibn Rushd explained that adultery is a form of intercourse that is not carried out through a legal marriage contract or through slave ownership, as applies in the classical Islamic legal system. Meanwhile, Indonesian scholars such as Hamka simplify the definition as any form of sexual intercourse outside of marriage. In the Encyclopedia of Islamic Criminal Law, *zina* is explained as sexual intercourse between an adult man and woman (*mukallaf*) who are not bound by a legal marriage (Noor Izzati Amelia et al., 2024).

From the perspective of the *fuqaha*, adultery is defined as the act of inserting a man's genitals into a woman who is unlawful for him, which is done out of lust without coercion. The main elements of adultery are penetration, even if it is only a little, and there is an element of intent and will from both parties. Each school of thought's view on *zina* has a different emphasis (Syafaatullah & Zulfiko, 2025): (1) The Malikis are of the view that *zina* is sexual intercourse between a man who has reached the age of puberty and reason (*mukallaf*) and a woman who is not his wife, with the intention and mutual consent. (2) The Hanafiyyah school of thought defines *zina* as unlawful sexual intercourse according to Sharia, committed with the genitals of a living woman, without coercion, by a Muslim man with a woman who is not his wife. (3) The Syafi'iyah school of thought emphasizes that *zina* is a forbidden act that occurs through the entry of the male genitals into the female genitals clearly and without doubt, and is done because of desire. (4) The Hanbaliyyah have a broader view, defining *zina* as any form of unauthorized sexual intercourse between a man and a woman, either through the genitals or rectum, which is done without the bond of marriage.

The *fuqaha* 'jurists' define *zina* as sexual intercourse that occurs between a man and a woman, with penetration into the woman's vagina, without a valid marriage bond or ownership that is recognized in sharia. This means that any form of sexual intercourse outside of marriage, without any doubt of ownership status or legal ties, is categorized as *zina*. *Zina* is considered a major sin in

Islam for a number of fundamental reasons. First, adultery violates the sanctity and honor of the marriage bond, which in Islam is considered a holy relationship full of love, grace and tranquility. Adultery undermines the foundation of the family, which is the basic unit in the structure of Islamic society. Secondly, adultery is also a form of defiance against Allah's command and damages the relationship between man and his Lord. In The Qur'an Surah Al-Furqan verse 68, adultery is mentioned along with other major sins such as associating partners with Allah and killing without right, and the perpetrator is threatened with severe punishment. Due to the severe impact of adultery on the individual, family and society, as well as its violation of God's law, Islam prescribes strict sanctions for adulterers, reflecting the importance of maintaining chastity and social order. The meaning of verse ([Abdul Waheed Tariq et al., 2023](#)): *'Those who do not associate partners with Allah, do not kill those whom Allah has forbidden except with a just cause, and do not commit adultery. Whoever does so will surely incur a sin'*.

The Applicability of Legal Sanctions to Consensual Non-Monogamous Relationships: A Comparative Legal Perspective

In the context of Indonesian positive law, the act can be categorized as adultery if the perpetrator is an individual who has been bound in marriage. However, because Article 284 of the Criminal Code is a complaint offense, the legal process against this act can only be carried out if there is a report from a legal spouse who feels aggrieved ([Adnan, 2021](#)). In practice, swinger activities become a gray area in the Criminal Code because the perpetrators usually do not report their partners, considering that the activity is carried out on the basis of mutual consent. This makes it difficult for criminal law to reach or crack down on the practice, unless there are other criminal elements such as the dissemination of pornographic content or violations of public decency norms ([Michelle Wolkomir, 2019](#)). On the other hand, Indonesian society, which upholds moral values and decency, still considers that the practice of swinger is contrary to religious and cultural norms, although not always directly charged by the Criminal Code ([Parhan et al., 2025](#)).

In the Criminal Code (KUHP), adultery was regulated in a limited manner in Article 284. This article states that adultery is only subject to criminal sanctions if committed by one of the parties bound in marriage. The criminal sanction imposed is imprisonment for a maximum of nine months, as applicable to: (a) a married man who commits adultery; (b) a married woman who commits adultery; and (c) a third party who knows that their partner is married but still participates directly in the act. It should be noted that prosecution under Article 284 is based on a complaint, meaning that legal proceedings can only be pursued if there is a complaint from the spouse who feels aggrieved or "insulted" by the act. Furthermore, the complaint must be followed within three months by a petition for divorce or legal separation in order to be processed legally. Additionally, the complaint may be withdrawn as long as the investigation process has not yet begun. This provision indicates that under the old Criminal Code, legal protection of morality in the context of adultery remains limited, as it only applies to cases where one party is a married individual and there is an element of objection from the aggrieved lawful spouse ([Ardiansyah et al., 2022](#)).

The criminal penalty stipulated in Article 284 of the Criminal Code for adultery is imprisonment for a maximum of nine months. This provision applies only to individuals who are married and engage in sexual relations outside of marriage (gendak or overspel), as well as to third parties who are aware that their partner is married. In this context, Article 284 (1) explicitly states that both men and women who are married and violate Article 27 of the Civil Code (BW) may be prosecuted, including those who are aware of the marital status of one of the parties involved. However, the enforcement of criminal penalties cannot be carried out without a complaint from the lawful spouse who feels their dignity has been violated, as emphasized in Article 284 (2). This offense is an absolute complaint-based offense, meaning that without an official complaint, legal proceedings cannot be initiated. Additionally, if the couple is bound by the provisions of Article 27 of the BW, the complaint must be followed within three months by a petition for divorce or separation to be legally accepted ([Memo Bayu Pratama, 2022](#)).

A major problem in law enforcement against the crime of adultery as an absolute complaint offense lies in the limited evidence, especially witness testimony. Due to the clandestine nature of the offense, investigators and prosecutors often experience difficulties in obtaining two sufficient legal evidences, as required by the criminal procedure law. Although witnesses can be presented during the trial process, the number often does not meet the minimum quota of two witnesses as stipulated in Article 184 of the Criminal Procedure Code. Even when witnesses are successfully presented, the validity of their testimony can be questioned due to memory constraints, emotional pressure, or even deliberate intent to cover up the truth even though they have been sworn under the law. The problem becomes even more complex because Article 168 of the Criminal Procedure Code explicitly states that spouses and blood relatives in a straight line up and down are not allowed to be witnesses in court, except in certain cases. This indirectly limits the scope of evidence, whereas in the context of adultery offenses, the closest parties are often the only source of information that knows the actual events. This provision is ironic in practice, because while the state requires a complaint from the aggrieved party (husband or wife), their testimony cannot be used as evidence in court. In addition, psychological and socio-cultural factors also reinforce the challenges in the law enforcement process against this offense. The aggrieved party often feels ashamed or afraid of social stigma when reporting adultery cases to law enforcement officials. On the other hand, the perpetrator will certainly try to hide his actions in order to avoid criminal sanctions. Thus, although normatively this criminal offense has been expressly regulated in the Criminal Code, in practice adultery cases rarely reach the prosecution stage due to cultural, emotional, and technical evidentiary obstacles (Lamrony Putra Sianturi et al., 2022).

This poses its own dilemma. In swinger practices, because the activity is carried out on the basis of consensus and mutual consent between husband and wife, it is very unlikely that one party will report their own partner to the authorities. In fact, in the context of a mutual relationship, both are equally involved and enjoy the activity. Therefore, without a sense of harm or betrayal between the spouses, the formal requirements of a complaint as a basis for prosecution are not met (Haywood, 2022). This shows that there is a gap between legal norms and social reality, which makes the practice of swinger, although substantially violating norms of decency, still difficult to reach by positive criminal law if it is not accompanied by a complaint (Sirajuddin Sirajuddin et al., 2024).

This legal gap reflects a broader tension between applicable criminal law and evolving social behavior in contemporary society. While swinger practices may materially violate prevailing moral norms, particularly in jurisdictions that uphold conservative cultural or religious values, the absence of a formal complaint (offense of complaint) makes them legally often unenforceable (Akmal & Azizah, 2025). From a doctrinal point of view, this situation shows the limitations of positive criminal law when dealing with consensual acts in the private sphere, especially when the two parties are the perpetrators as well as those who agree with each other (Rizki Maulana & Dhiauddin Tanjung, 2024). Reliance on locus standi, i.e. the exclusive right of a spouse or nuclear family to file a complaint, creates structural barriers that preclude legal intervention in swinger practices, even though such practices can substantially undermine the integrity of the family institution (Johnny Okongwu et al., 2023). This shows a more complex application of the ultimum remedium principle in Indonesian criminal law, where criminal sanctions are positioned as the last resort. As is known, ultimum remedium is a principle in criminal law that limits the use of criminal sanctions as a last resort in resolving legal cases. This means that the imposition of punishment should only be carried out if other efforts are considered inadequate, ineffective, or have failed to overcome existing legal problems. This principle was born from the realization that criminal law has a repressive nature and carries serious consequences for human rights, so that its application must be carried out carefully and proportionally (Siregar, 2023). The application of this principle can prevent the excessive use of criminal law and ensure that criminal sanctions are only applied when absolutely necessary, namely when other legal remedies are ineffective or inadequate. Thus,

criminal law can function proportionally and fairly in resolving legal problems in society (Ardika, 2021).

However, it should be noted that the new Criminal Code, Law Number 1 Year 2023, brings changes in terms of the scope of adultery complaints. Not only husbands or wives, but third parties who are affected, such as families such as parents and children are also given the right to make complaints. This indicates an expansion of the reporter's authority which can be a loophole to ensnare swinger activities, especially if the action is known by other family members and is considered to tarnish the honor or dignity of the family (I Made Ananda Hardiantha et al., 2024). For example, in a traditional family that still upholds norms of decency, swinger activities that are known by the offender's children or parents may trigger a legal complaint on the basis of violation of the family's moral values and dignity (Lade Sirjon & La Ode Awal Sakti, 2023).

Overall, the practice of swinger can be qualified as adultery under Indonesian criminal law if it is committed by a married individual who has sexual intercourse with another person outside of marriage. However, due to its status as a complaint offense, its enforcement is highly dependent on the willingness of certain parties to file a report. Without such a complaint, the state does not have the authority to take action against the activity, even though it has substantially fulfilled the elements of adultery. This shows that in the swinger context, the complaint aspect is a key element that determines whether the act can be prosecuted or not.

Swinger in Islamic criminal law includes *jarīmah hudud*, which is a crime with a punishment that has been determined permanently by the Sharia through the Qur'an and Sunnah. As explained by Abu Ya'la, citing the opinion of Al-Māwardi, *hudud* is a form of threat originating from Allah to prevent humans from committing sins, especially when sexual desires overwhelm human awareness of the threat of punishment in the afterlife. In his definition, Al-Mawardi equates *hudud* with *zawajir* 'threats', although other scholars refer to it as '*uqubah* 'punishment'. Despite the differences in wording, all these definitions essentially share the same substance, namely that *hudud* is a fixed legal provision that cannot be altered and is permanent because it is directly derived from the sacred text. In this context, adultery holds a significant position as one of the forms of *hudud* crimes, as its punishment is clearly stipulated in the Quran and hadith, whether it be flogging for those who are unmarried or stoning for those who are married. Al-Sayyid Sabiq also emphasizes that *hudūd* is closely related to the rights of Allah, and thus cannot be equated with *qisās*, which primarily concerns human rights '*ḥaqq adami*', or *ta'zir*, which is flexible and dependent on the judge's discretion. Therefore, the enforcement of penalties against adulterers is not merely the implementation of the law but also a form of safeguarding divine norms aimed at protecting the overall welfare of the community (Nurul Irfan & Masyrofah, 2013).

This punishment is certain, but the *ijtihād* of the scholars remains open to scientific study. According to Al-Buti, Islamic law remains relevant throughout the ages, even more so than some of the destructive modernity. 'Abd al-Qādir 'Audah emphasizes that the purpose of Islamic criminal law is not only to provide a deterrent effect, but also to maintain social order and provide legal education to the community. *Zina* in Islam is classified into two: *zinā muḥṣan* and *zinā gair muḥṣan* (Supardin & Abdul Syatar, 2021). For unmarried adulterers, the prescribed punishment is 100 lashes, as stated in Qur'an Surah An-Nur verse 2: '*The female adulterer and the male adulterer, punish each of them a hundred times, and do not let compassion for either of them prevent you from observing the religion (law) of Allah if you believe in Allah and the Last Day. Let their punishment be witnessed by some of the believers*'.

The punishment for *gair muḥṣan* adulterers has been clearly prescribed in Islamic criminal law as one hundred lashes. This ruling is explicitly stated in Surah An-Nur verse 2, which commands that both the male and female adulterers be flogged one hundred times without showing mercy, as an act of obedience to the law of Allah for those who truly believe in Allah and the Last Day. This command is further supported by the hadith of the Prophet Muhammad narrated by 'Ubadah ibn al - Samit. The flogging punishment falls under the category of *hudud*, which refers to fixed punishments determined by the Shari'a and thus considered immutable. As such, judges are

not permitted to reduce, increase, delay, or substitute this punishment with any other form of penalty. This indicates that the implementation of this punishment is not merely an individual corrective measure, but rather a collective obligation to uphold the sanctity of Islamic law and preserve public morality. Furthermore, the flogging punishment for *ghairu muhsan* offenders is classified as the right of Allah '*ḥaqq Allah*', meaning that it cannot be pardoned by individuals, victims, families, or even the state authority. Because it is a divine right, personal forgiveness has no legal bearing in such cases, and the enforcement of this punishment becomes a judicial responsibility within the Islamic legal system (Marsaid, 2020).

In addition to the hadith narrated by 'Ubadah ibn al-Samit, there is another hadith that mentions the supplementary punishment of exile for *ghairu muhsan* adulterers. The hadith, reported by Zaid ibn Khalid al-Juhani, states: *"I heard the Messenger of Allah (peace be upon him) order that a person who committed fornication but was not previously married be flogged one hundred times and exiled for one year"*. This hadith indicates that exile '*tagrīb*' for one year may accompany the corporal punishment of flogging. However, classical Islamic jurists differ in their interpretation of the implementation of this sanction. Imam Malik maintained that the adulterer should be confined within their own locality for one year. Imam al-Syafi'i took a milder stance, suggesting that the individual should only be placed under supervision during that period. On the other hand, Imam Ahmad rejected the notion of mandatory confinement or exile. Meanwhile, Imām Abū Ḥanīfah considered *tagrīb* to fall within the discretionary authority of the judge, who has the competence to decide what is most beneficial for both the offender and society at large (Fitri Wahyuni, 2018).

However, if the adulterer is or has been legally married, then the punishment changes to stoning or being stoned to death. This punishment is not explicitly written in the current Qur'an because the verse containing it has been *nasakh tilawah*, but the ruling or provision remains valid, as explained in *mutawatir* traditions. One of the famous narrations is the statement of 'Umar ibn al-Khattab, who stated that the verse on stoning had been revealed and recited by the Prophet Muhammad, and implemented during his lifetime. 'Umar ibn al-Khattab was concerned that people in the future would deny the law of stoning because they could not find it in the Qur'an, even though it was still a valid part of the Shari'ah. 'Umar ibn al-Khattab even quoted the form of the verse: *"If an old man and woman commit adultery, stone them both as a punishment from Allah"*. Scholars, including Imam al-Nawawi, agree that unmarried adulterers are subject to 100 lashes, while married adulterers are subject to stoning. This agreement shows the consistency of the law of adultery in Islam based on authoritative Shari'ah sources, both from the Qur'an, *mutawatir* hadith, and scholarly consensus (Amir Zaman Kakar et al., 2024). There are several narrations that mention the existence of stoning punishment, among others: (Nurul Irfan & Masyrofah, 2013)

First, Abdullāh ibn 'Abbas narrated that 'Umar ibn al-Khattab once addressed the Messenger of Allah on the pulpit and said: *"Verily, Allah sent Muhammad with the truth and revealed the Qur'an. Among the verses that were revealed was the verse about stoning. We have read it, studied it, and understood it. The Messenger of Allah carried out the punishment of stoning, and we carried it out after him. I fear that when a long period of time has passed, some people will say: 'We did not find the verse about stoning in the Book of Allah,' and then they will abandon the duty that Allah has revealed. Indeed, the punishment of stoning is in the Book of Allah, and it is applicable to married adulterers, both men and women, when there is strong evidence, pregnancy, or confession from the offender"*.

Second, Abu Hurairah and Zaid bin Khalid al-Juhani both said: *"We were with the Prophet. Suddenly a man came and said: 'I swear to Allah that you will judge for us by the Book of Allah.' Then a more articulate man came and said, 'Give us a decision based on the Book of Allah and allow me to speak first.' The man said, 'My son worked as a laborer for someone and committed adultery with his employer's wife. I atoned for this with one hundred goats and a servant. However, when I asked the scholars about this, they said that my son should be flogged a hundred times and exiled for a year, while his employer's wife should be stoned.' So the Messenger of Allah said, 'By*

the One in Whose hand my soul is, I will decide between you based on the Book of Allah. One hundred goats and the servant shall be returned, your son shall be flogged one hundred times and exiled for one year. And you, O Unais, go and investigate the woman. If she confesses, then stone her.' So Unais investigated, and it turned out that the woman confessed, so she was stoned''.

The punishment of stoning '*rajam*' refers to the death penalty carried out by pelting the offender with stones until death occurs. This form of punishment has been widely accepted by the majority of classical Islamic jurists '*fuqaha*', based on authentic and *mutawatir* hadith, although it is not found in the written text of the Qur'an due to the abrogation of its recitation '*nasakh tilawah*'. Despite this, the legal ruling remains binding in Islamic law. The only notable exception to this consensus comes from the Azariqah faction of the Khawarij, who rejected *rajam* as a legitimate punishment. Their reasoning was based on a strict acceptance of only *mutawatir* hadith, and they interpreted the punishment for adultery, regardless of marital status, as a hundred lashes, relying solely on Qur'an Surah Al-Nur verse 2 (Marsaid, 2020).

Furthermore, there are authentic narrations that illustrate the application of the *rajam* 'stoning punishment' for married adulterers '*muhsan*' who sincerely repent and willingly submit to the legal consequences. One detailed narration comes from Abdullah ibn Buraidah, who reported from his father about a woman named Al-Gamidiyah, who approached the Prophet Muhammad confessing her adultery and requesting to be punished. Initially, the Prophet refused her plea. However, the next day she returned, emphasizing that she was pregnant due to her sin and thus urged the Prophet to enforce the prescribed punishment. The Prophet then instructed her to wait until after she gave birth and weaned her child before carrying out the punishment. After Al-Gamidiyah had breastfed her child and it was old enough to eat solid food, she returned to the Prophet carrying the child wrapped in cloth, confirming she had fulfilled the waiting period. At that time, the Prophet commanded the companions to prepare for her punishment. She was buried up to her chest in a pit, and the companions, including Khalid ibn Walid, participated in throwing stones. When Khalid threw a stone that struck her head and blood splattered on his face, the Prophet gently reminded him to be careful and spoke of Al-Gamidiyah's sincere repentance, stating that if her repentance had belonged to a corrupt official (such as a tax collector), it would have sufficed to forgive all his sins. Following the execution of the punishment, the Prophet Muhammad ordered that she be prayed over '*salat al-janazah*' and given a proper burial. Similar accounts involve Ma'iz ibn Malik and two unnamed men who also confessed to adultery and insisted on receiving the *rajam* punishment. Their repeated requests and acceptance indicate the seriousness with which the Prophet and the early Muslim community upheld the law and its moral significance. The fact that they voluntarily presented themselves for punishment after sincere repentance reflects the intrinsic connection in Islamic law between *hudud* enforcement and personal accountability. Additionally, there is the case of a woman from the Juhainah tribe, who came to the Prophet while pregnant and confessed to *zina*. The Prophet ordered her guardian to care for her and wait until she gave birth before bringing her back. Once the waiting period was over, she was subjected to stoning and then prayed over by the Prophet. 'Umar ibn al-Khattab questioned the Prophet about praying for someone who had committed adultery, to which the Prophet replied that her repentance was so sincere and complete that if it were distributed among the seventy residents of Medina, it would suffice them all. He emphasized that no repentance is greater than one made sincerely for the sake of Allah (Nurul Irfan & Masyrofah, 2013).

Legal Protection and Legal Certainty for Individuals or Couples Involved in Consensual Non-Monogamous Relationships or Swingers

Legal protection is a fundamental right of every citizen, guaranteed by the constitution and the national legal system. In general, legal protection refers to the state's efforts to safeguard legal subjects through both preventive and repressive measures, ensuring justice, legal certainty, utility, and public order. This protection may take the form of legislation, legal assistance, or court decisions that defend individual rights from harmful or discriminatory actions. Article 28I

paragraph (2) of the 1945 Constitution of the Republic of Indonesia explicitly states that every person has the right to be free from discriminatory treatment on any grounds and is entitled to protection against such discriminatory actions. This reflects the state's obligation to ensure that every individual is treated fairly and equally before the law, without exception, and receives legal protection from any violations of their rights (Putri & Amiruddin, 2020).

Based on the views of legal scholars, legal protection is not merely a formal guarantee of individual rights, but also reflects the function of law in maintaining social balance and preventing conflicts of interest within society. Satjipto Rahardjo emphasizes that legal protection is a form of safeguarding human rights that are violated by others, and an effort to ensure that the public can fully enjoy their rights as regulated by law. In this context, legal protection serves as an instrument to organize various interests in society so that they do not collide and to create social harmony. Meanwhile, Philipus M. Hadjon expands the definition of legal protection as the recognition and respect for human dignity, as well as acknowledgment of the fundamental rights possessed by every legal subject. According to Hadjon, legal protection is a mechanism to prevent arbitrariness and a concrete manifestation of legal norms and rules that function to protect parties who are vulnerable or at risk of being harmed. Therefore, legal protection is not merely procedural but also represents the embodiment of justice and legal certainty in a democratic rule of law (Arsyad & Narulita, 2022).

Adultery is categorized as an absolute complaint offense in the Indonesian Criminal Code (KUHP). This means that the law enforcement process for adultery offenses can only be initiated if there is an official complaint from a party who has a direct legal relationship with the offender, such as a husband against his wife, a wife against her husband, or a parent against their child (under the latest KUHP). Therefore, not just anyone has legal standing to report adultery cases without such a formal complaint (Jannah Matondang, 2022).

The legal protection provided by this provision is very important. First, this provision ensures legal certainty, which is a fundamental pillar of the rule of law. Legal certainty means that the application and enforcement of the law are carried out based on clear and established legal grounds. By requiring an official complaint from a party with a direct legal relationship to the alleged offender, the law prevents arbitrary or excessive actions that may arise from public sentiment, moral panic, or personal prejudice. Without this requirement, there is a risk that individuals or groups without legal standing could misuse the criminal justice system to target or harass others based on subjective moral judgments or discriminatory attitudes. The mechanism of an absolute complaint-based offense effectively filters out such cases, ensuring that only parties with a legitimate legal interest can initiate criminal proceedings (Oktaviani & Agusmidah, 2023). Second, this legal protection also serves a repressive function against the actions of law enforcement officers, meaning it imposes strict boundaries on their authority. Under the absolute complaint requirement, law enforcement officials are explicitly prohibited from initiating investigations, conducting arrests, or detaining individuals without a formal complaint submitted by a party who has a direct legal interest—such as a spouse or parent of the alleged offender. This restriction acts as a safeguard to prevent the misuse of state power and arbitrary enforcement of moral norms that are not supported by legal standing. It ensures that individuals, particularly those engaged in consensual non-monogamous relationships (commonly known as swingers), are shielded from unwarranted intrusion by authorities based solely on moral or societal disapproval (Damayanti et al., 2024).

In the context of applying Article 284 of the Indonesian Criminal Code (KUHP), which regulates adultery, the principle of *due process of law* is fundamental in ensuring the rights of suspects from the outset of the criminal justice process. *Due process of law* does not merely refer to the formal application of procedural criminal law, but also encompasses a profound respect for human dignity and the fundamental rights of every citizen, including those accused of committing adultery. Therefore, at every stage of examination, whether during investigation, prosecution, or trial, the accused must be granted their full rights, including the right to be heard, the right to legal

counsel, the right to present a defense, and the right to be tried before an independent and impartial judge (Fernando, 2021).

When a couple is charged under Article 284, it is crucial that law enforcement officers do not act arbitrarily under public pressure or moral panic, but rather ensure that the legal process proceeds objectively and proportionally. This reflects the state's commitment to protecting human rights, as outlined in the Indonesian Code of Criminal Procedure (Law No. 8 of 1981), which forms the foundation of the national criminal justice system and prioritizes the protection of citizens. This system demands that law enforcers not only apply the law mechanically but also adopt an internal attitude that upholds the principle of substantive justice. Without such recognition, law enforcement may turn into a tool of discrimination rather than a means of protection. Thus, the enforcement of *due process of law* in adultery cases ensures not only that the legal process follows established rules but also affirms that the state must not violate individual rights, even for those accused of breaching social or religious norms. A fair legal process must distinguish between the enforcement of law and moral judgment, and guarantee that no citizen is sacrificed in the name of public interest or pressure from certain groups (Andreyan Noor & Muhammad Nurcholis Alhadi, 2025).

The enforcement of law in accordance with the *due process of law* principle is essential to maintaining fairness within the criminal justice system. This principle requires that every stage of the legal process, starting from investigation, prosecution, to trial, must be carried out in a transparent, impartial, and accountable manner, free from external interference or coercion. Upholding *due process* means ensuring that the rights of individuals are respected and protected at all times, thereby minimizing the risk of procedural errors or miscarriages of justice. In adultery cases, where moral judgment often overshadows legal reasoning, adhering strictly to due process safeguards individuals from arbitrary treatment and reinforces the state's obligation to administer justice based on law, not societal bias or pressure (Haniyah, 2024).

Just as in modern criminal law systems that uphold the principle of *due process of law*, Islamic teachings also provide strict protection for individual rights, particularly in cases such as swingers, which may carry serious legal consequences. Both legal systems share a common principle of caution and protection against arbitrary accusations. In the context of Islamic law, this is reflected in the stringent evidentiary requirements for proving adultery, which aim to safeguard human dignity and honor. According to Sayyid Sabiq in *Fiqh al-Sunnah*, a conviction for *zina* can only be made based on one of three means: first, a voluntary confession (*iqrar*) made freely and repeatedly by the accused without coercion; second, the testimony of four trustworthy male witnesses who directly observed the act in clear detail; and third, in certain limited contexts, pregnancy may serve as supporting evidence, but never as sole proof. In such cases, pregnancy must be corroborated by a confession or other clear indicators that confirm the act occurred outside a lawful marriage (Yasa'Abubakar & Maulana, 2018).

The principle of caution and the protection of human rights in Islamic law is reflected not only in the strict requirements for proving adultery '*zina*', but also in the implementation of its punishments, particularly concerning pregnant women. Islam upholds the protection of life and the safety of the child as part of substantive justice in the enforcement of the law. This is based on a hadith of the Prophet Muhammad (peace be upon him) narrated by Ahmad, in which a woman from the Banu Juhainah tribe, pregnant as a result of adultery, came to the Prophet and requested that the prescribed punishment be carried out upon her. However, the Prophet did not immediately impose the *hudud* punishment; instead, he instructed that she be treated well until she gave birth. Even after delivering the child, the woman was not punished immediately but waited until she had nursed her child and was physically strong. Scholars agree that the punishment of stoning or lashing must not be carried out on a pregnant woman until she has completed the period of childbirth, postnatal recovery '*nifas*', and breastfeeding, in order to protect the innocent child in the womb or during nursing. This provision shows that in Islamic law, the implementation of *hudud* punishments must consider humanitarian aspects and must not violate the rights of third parties, such as children.

Therefore, Islamic law emphasizes not only the imposition of sanctions but also the fulfillment of justice, the protection of life, and respect for sincere repentance (Abdul Basith Junaidy et al., 2020).

Protection of individual dignity and honor in Islamic law is not limited to the prevention and proof of *zina* but is also reflected in the strict regulation of *qazaf*, the accusation of *zina* without sufficient evidence. Islamic law considers accusing someone of committing *zina* without presenting four just male witnesses to be a serious violation of personal and social honor. Therefore, the perpetrator of *qazaf* may be subjected to a *hadd* punishment of 80 lashes, as agreed upon by the majority of Islamic jurists, provided that the accused fulfills the criteria of being free, of legal age, sane, a Muslim, and of upright character. Even indirect accusations (through *dalalah*), such as calling someone a child born out of wedlock or attributing them to someone who is not their father, may fall under the category of *qazaf* and are punishable by *ta'zir*, due to the harm they cause to a person's honor. This illustrates that within the framework of Islamic law, the protection of human dignity and reputation is paramount. The prohibition of *qazaf* serves to protect individuals from verbal abuse, slander, and character assassination that could undermine social integrity, and ensures that serious allegations such as *zina* are not used irresponsibly to defame others without legitimate and lawful evidence (Marsaid, 2020).

This Qur'anic verse 4 of Surah Al-Nur firmly closes the door to any attempt to disgrace or humiliate upright individuals by baseless accusations of adultery. Islam imposes a strict and severe punishment for those who make such accusations without proof, treating the crime with gravity almost equivalent to the act of *zina* itself. The punishment consists of 80 lashes, the permanent rejection of the accuser's future testimonies, and branding the accuser as *fasiq*, a morally corrupt person (Abdurahman, 2023).

In Islamic legal literature, Al-Mawardi emphasizes that the punishment for *qazaf* is not only intended to serve as a deterrent but also functions to preserve social harmony. This aligns with the objectives of *maqasid al-syari'ah*, particularly the protection of honor '*hifz al - 'ird*', which is one of the five essential principles of Islamic law, alongside the protection of religion, life, intellect, and property. From the perspective of Islamic legal philosophy, the offense of *qazaf* is a manifestation of Islamic law's commitment to safeguarding three fundamental human rights: the right to personal dignity, the right to security, and the right to peace of mind. A baseless accusation of *zina* (adultery or fornication) can severely damage an individual's personal integrity, tarnish family reputation, destabilize social relationships, and provoke unrest in the community. Therefore, the implementation of *hadd* punishment for *qazaf* is aimed at striking a balance between protecting individual rights and preserving the public interest. According to Ibn Qudamah, the protection of personal honor is a collective obligation (*farḍ kifayah*) that must be upheld by the state through the application of fair and just laws. In this sense, Islamic criminal law views slander not merely as a private grievance but as a threat to communal morality and cohesion. The legal system, therefore, acts as a guardian of both social ethics and individual dignity, ensuring that justice is not only retributive but also restorative and preventive in nature (Dhimas et al., 2025).

In Islamic law, justice is not only reflected in the implementation of punishments but also in the procedures leading up to those punishments. The rights of the accused are a fundamental aspect of ensuring that justice is upheld from the very beginning of any legal process. These rights must be guaranteed and protected for every individual who becomes a suspect in a criminal investigation, including in cases involving moral or sexual offenses such as "swinger" activities. The recognition of these rights serves to maintain the dignity and humanity of the accused throughout the investigation process. Islam emphasizes that legal procedures must be carried out fairly and justly, without resorting to torture, coercion, discrimination, forced confessions, or arbitrary detention. Such procedural safeguards are not optional but are obligations that the state must fulfill to ensure that no individual is wronged or treated unjustly due to societal bias or moral judgment alone (Nasution & Ishaq, 2024).

The principle of equality before the law and protection from arbitrary treatment is fundamental in ensuring justice for every individual, including offenders such as those involved in

swinging. Islam strictly prohibits all forms of torture, discrimination, and inhumane treatment during the legal process, as these actions contradict the values of justice and human dignity. Every person deserves to be treated fairly and with respect, regardless of their social background, status, or the nature of their offense. In this context, a swinger still retains legal rights that must be protected, including safeguards against arbitrary detention, coercion, forced confessions, and guarantees of a fair legal process based on credible evidence. Islamic law emphasizes that no individual may be punished without clear and strong evidence, as doing so would constitute an act of injustice that violates human rights and the rule of law. Therefore, even in the prosecution of a swinger, Islam demands that due legal procedures be upheld in order to honor truth and preserve human dignity (Muthoharoh, 2023).

Besides that, the concept of human rights holds a crucial position, and any form of violence or coercion committed against a suspect during the investigation process constitutes a clear violation of those rights. The two primary sources of Islamic law, the Qur'an and the Sunnah, explicitly emphasize the importance of restoring every right to its rightful owner. This principle forms the foundation for the protection and fulfillment of human rights in Islam. Acts of violence committed by law enforcement officers against suspects are not only legally impermissible but also religiously prohibited. The Qur'an strictly forbids coercion and compulsion, particularly in the pursuit of justice. As such, Islam upholds the integrity of the legal process by ensuring that no confession or testimony is extracted through force, and that every individual, regardless of the crime they are suspected of, is entitled to be treated with dignity and fairness in accordance with divine justice (Farhani & Firmantoro, 2024).

Thus, it is clearly illustrated that in Islamic criminal law, the protection of the rights of suspects is not solely based on the prohibition of violence and coercion during the investigation process, but is also rooted in a more fundamental principle: the realization of *mashlahah* 'public interest' and social justice for all human beings. *Mashlahah* in this context is understood as the universal objective of Islamic law, which is oriented toward the protection and elevation of human dignity. Any form of *ijtihad* or legal policy that ensures the achievement of *mashlahah* is considered valid and obligatory for Muslims to follow, while policies that lead to harm '*mafsadah*' must be rejected. This demonstrates that Islamic law is not merely textual and formal but also substantive and contextual. The principle of justice in Islam is regarded as a higher divine command that involves not only the fulfillment of individual rights but also represents a tangible form of piety '*taqwa*' before Allah. This aligns with the command of Allah in Surah al-Ma'idah verse 8, which instructs believers to uphold justice without being influenced by hatred, as justice brings one closer to piety. The verse underscores that in adjudicating legal matters, partiality or discrimination must be avoided, as all human beings are equal before the law. Therefore, Islam demands that law enforcement officials uphold the principles of equality and justice in every legal case they handle, including those involving suspects accused of engaging in swinger activities, regardless of their social status or background (M.Gazali Rahman & Salhan Tomayahu, 2020).

CONCLUSION

The regulation of *zina*, or 'adultery' and 'fornication,' varies significantly between Indonesian criminal law and Islamic law, highlighting the contrast between secular and religious frameworks. Indonesian law, based on Dutch colonial principles, only criminalizes adultery when at least one party is legally married, treating it as a complaint offense (*delik aduan*). Consensual sexual relations among unmarried individuals are not considered criminal acts. In contrast, Islamic law views *zina* as a serious violation of religious and social norms, without needing a complaint. It encompasses all sexual relations outside a lawful marriage, imposing strict evidentiary requirements, such as the testimony of four witnesses or a confession. This approach prioritizes the sanctity of marriage and social order. The discrepancy between these legal systems creates challenges in reconciling secular laws with the religious values of the majority in Indonesia, especially regarding consensual non-monogamous practices such as swinging. Swinging can be classified as *zina* if it involves married

individuals engaging in sexual relations outside their marriage. However, prosecution under Indonesian law largely relies on a formal complaint from an aggrieved spouse, complicating legal action against consensual practices. Islamic law designates *zina* as a *hudud* crime with fixed punishments, varying by the offender's marital status, 100 lashes for unmarried individuals and stoning for married offenders. These punishments are considered immutable rights of Allah aimed at preserving moral order. Legal protection is a fundamental right in both Indonesian and Islamic law. Indonesian law safeguards accused swingers through principles of legal certainty, requiring formal complaints to initiate proceedings. This protects against arbitrary actions. Conversely, Islamic law emphasizes the protection of dignity and honor, with stringent evidentiary rules and provisions against false accusations.

Given the rising visibility of swinger practices and their conflict with societal norms, there is a pressing need for proactive legal and social interventions. The government should implement legal literacy and public awareness campaigns, involving religious leaders and social influencers to reinforce moral values and the sanctity of marriage. Promoting a deeper understanding of marriage's significance can help prevent the normalization of such practices.

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