

ABSTRACT

Lately, the growing of the phenomenon of *zina* offense has reached an alarming stage because it continues to increase very rapidly both in terms of quantity and quality. Free sex phenomenon (premarital sex/fornication, adultery and cohabitation) looks increasingly and tends to be a trend (life style) among youth in Indonesia. Meanwhile, the phenomenon of prostitution that is an old social disease, up to this day still go on relatively free. It appears from the existence of brothel localizations in various cities in Indonesia that seems untouched by the law.

Such a reality happened in the middle of the Indonesian society is really ironic when considering the majority of Indonesia's population are Muslims, so that automatically majority of the perpetrators of free sex and prostitution are also Muslims. It clearly shows they (the perpetrators who are Muslims) are still in very low compliance against the teachings of their religion (Islamic criminal law provisions) which strictly prohibit (forbid) free sex and prostitution. On the other side, the criminal law applied in Indonesia (positive law) seemed powerless to prevent the occurrence of free sex and prostitution, and the punishment threatened unable to deter the perpetrators.

It's the fact that the majority of Indonesian people are Muslims who are not only tied to the Indonesian criminal law as positive law, but also morally bound by the Islamic criminal law as part of the teachings of Islam (*shari'a*). Therefore the author formulate the main problems to be discussed as follows: What're the differences between Indonesian criminal law and Islamic criminal law in setting (regulating) *zina* offense? What are the reasons underlying the importance (urgence) of reforming Indonesian criminal law pertaining *zina* offense? Is there any juridical-constitutional basis which allows the inclusion of the provisions of Islamic criminal law pertaining *zina* offense into the positive law in the context of the Indonesian criminal law reform in the future?

The research methodology carried out in this legal research is a normative legal research. Normative legal research refers to secondary data that concerns to the assessment of normative legal aspects involving: principles of law, doctrines, and the laws (provisions) regarding *zina* either contained in Indonesian criminal law or in Islamic criminal law. The research approach employed in this legal research is comparative study. In this legal research data is obtained by doing literature study. Literature study is conducted by reading and reviewing a variety of library materials relating to research issues, both legal materials as well as non-legal materials. In addition, additional data is also obtained by conducting interviews with resource persons (legal experts).

The result of this legal research reveals that in normative level there are fundamental differences between the provisions pertaining *zina* offense in Indonesian criminal law and in Islamic criminal law, on the terms: the definition of *zina*, the basic laws governing *zina*, reason and the purpose of establishing the law, the nature and form of sanction to the offenders, the sociological background

of the establishment of law (provisions) pertaining *zina*, and the philosophical foundation of the formulation of law (provisions) pertaining *zina*. The result of this legal research also shows that there are strong reasons to run the reformation of Indonesian criminal law pertaining *zina* offense, both theoretical-normative reasons and empirical-sociological reasons. Then, referring to the provisions of Article 29 paragraph 2 of the Constitution 1945 (Undang-Undang Dasar 1945), found that there are juridical-constitutional basis which is very robust to the inclusion of the provisions of Islamic criminal law pertaining *zina* offense as part of positive law in Indonesia.

Key words: *zina* offense, *shari'a*, positive law, criminal law