

## PUBLIC MORALITY IN INDONESIAN PENAL CODE DRAFT: ZINA DEFINITION DEBATE

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**Abstrak:** *Bahasan tentang dihidupkannya kembali hukum zina di negara-negara mayoritas Muslim dilakukan oleh Kepala Hukum Pidana yang mendapat banyak perhatian dari segi nasional dan internasional. Penelitian ini menguji kontestasi definisi Zina antara aktor. Ia berpendapat bahwa nilai-nilai agama telah menjadi kerangka kerja untuk menjadikan moralitas menjadi urusan publik melalui hukum reformasi, di negara mayoritas Muslim Indonesia yang majemuk. Kontestasi antara tempat-tempat keagamaan dan sekuler dalam proses, sebagai bagian dari islamisasi yang sedang berlangsung. Data dari media yang dikumpulkan, seperti surat kabar online dan program TV One (Indonesian Lawyers Club) di mana para aktor terlibat dalam membangun wacana gender, seksualitas, dan regulasi di Indonesia. Oleh karena itu, ini berkontribusi pada diskusi mengenai masalah gender dan seksual di negara-negara mayoritas islam, di mana ide-ide agama dan sekuler dipertentangkan.*

**Kata Kunci:** Zina, KUHP, Moralitas Publik, Jenis Kelamin, Seksualitas.

**Abstract:** *A heated debate at the end of 2017 to the beginning of 2018 in Indonesia, on zina redefinition in Indonesian Penal Code that received both national and international attention, as becoming an interesting study discussing the revioal of Zina law in Muslim majority countries. This study examines the contestation over Zina definition between actors. It argues that religious values has become framework to make morality becomes public matter through the law reform, in Indonesian plural Muslims majority country. The contestation between religious and secular took place in the process, as part of ongoing Islamization. The data is collected from media, such as online newspaper and the TV One Indonesian Lawyers Club program where actors were involved in constructing the discourse of gender, sexuality, and its regulation in Indonesia. Hence, this contributes to the discussion on gender and sexuality in Muslims majority countries, where religious and secular ideas are contested.*

**Keywords:** Zina, Penal Code, Public Morality, gender, sexuality

### INTRODUCTION

This study explores how the current debate of Penal Code Draft, regarding *zina* (adultery) definition expansion was heated. On December 14th 2017, Indonesian Constitutional Court rejected the petition by the Family Love Alliance (FLA), demanding to redefine *zina* (adultery) in Indonesian Penal Code, so that it can criminalize all sex outside marriage, including same-sex relationship. The group asked the court to expand *zina* definition, specifically those written in the article 284, 285, 292 of Indonesian Penal Code, since it is considered as

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not representing Indonesian societies understanding on *zina*. Inherited by the Dutch colonialist, this law criminalizes married people who have sex not with their couples (based on accusation), men who force women who are not their wives to have sex (as a rape crime), and adults who do fornication towards same sex non-adults (as fornication crime). The demand was to expand *zina* definition in the article 284 above, thus unmarried men and women who have sex can be punished, to delete the phrase, “women who are not their wives” in the article 285, since rape can be done either by men or women, and to also punish adult couples who do fornication, in the article 292.<sup>2</sup> Looking at the arguments of those proposing it, morality values taken from religious teachings have been those motivating it. This leads us to the question, “How is public construction of legal argument on *zina* redefinition in the Penal Code?” Hence, this study explores how morality, which is contextual, argued, and shifted, has been motivating particular people to change and influence public policies and law.

It is interesting that the Penal Code draft has its long history and undergone several processes of revision, as a struggle to make the law in line with Indonesian culture and religion. The effort has begun since 1981, underwent several revisions in 2000, 2005, 2015, and then recently the debate comes up, mainly about whether or not sex outside marriage, *kumpul kebo* (living together outside marriage), and LGBT act should be criminalized and be included in the Penal Code Draft. As Blackwood contended, this is an attempt of controlling sexuality by the state through the dominant Islamic discourse proposed by religious moralists group, as I called, linked to normative gender and heterosexuality through marriage institution that excludes and criminalizes the so-called same sex intimacy.<sup>3</sup>

As religious resurgences have been emerging in Southeast Asia, as Hefner contended, Indonesia becomes one of Muslims majority country where its modernization is accompanied by Islamization<sup>4</sup>. The

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<sup>2</sup> Jeffrey Hutton, “Indonesian Constitutional Court Declines to Ban Sex Outside Marriage,” *The New York Times*, December 14, 2017, sec. Asia Pacific, <https://www.nytimes.com/2017/12/14/world/asia/indonesia-court-ban-sex.html>; Tito Sianipar, “MK Tolak Perluasan Makna Zina: Yang Bersorak Dan Dan Yang Menolak,” *BBC Indonesia*, December 14, 2017, sec. Indonesia, <http://www.bbc.com/indonesia/indonesia-42351141>.

<sup>3</sup> Evelyn Blackwood, “Regulation of Sexuality in Indonesian Discourse: Normative Gender, Criminal Law and Shifting Strategies of Control,” *Culture, Health & Sexuality* 9, no. 3 (2007): 293–307.

<sup>4</sup> Robert W. Hefner, “Religious Resurgence in Contemporary Asia: Southeast Asian Perspectives on Capitalism, the State, and the New Piety,” *The Journal of Asian Studies* 69, no. 4 (November 2010): 1031–47, <https://doi.org/10.1017/S0021911810002901>.

Islamization itself is ongoing process, and becomes more visible after the collapse of New Order. As Ricklef contended, what happen now is the contestation of Islamic interpretation in the context of nation-state (Ricklefs, 2012). To be a good Indonesian means to be religious and nationalist, or at least people have to show that they are not unislamic or unreligious to be a good citizen. Being unislamic or unreligious means threatening the country. Thus, this kind of debate is part of Islamization of the country through its law. However, even though being purposed and discussed in 1980s, the draft was just recently seriously responded and was followed up by the activists and those supporting it to be passed and be implemented. I myself think the draft will soon pass, looking at how many scholars, religious teachers, and activists agreed on and demanded the draft to be passed, as the victory over this gender and sexuality discourse. So why now? Can it be considered as the religious-moralists victory?

In order to collect the data, I've collected and examined discussions, news, debates in both local and international medias, where religious leaders, civil societies, Government, and scholars have responded to the issue. In this respect, I mostly examined the discussion regarding the issue presented by Indonesian Lawyers Club, TV One. How the actors build and base their arguments are taken into consideration.

## **GENDER, SEXUALITY AND PUBLIC MORALITY**

Regarding the public morality and regulation issue, there are several literatures discussing the dynamic of society debate on how morality should be embodied in Indonesians nature, that eventually influence its system of law, politic, and culture. Looking at the religious resurgence in Southeast Asia, followed by the increasing power of socio-religious movement, public morality debate has been fulfilling the nations debate. Hence, I categorize the literatures into two where the first discuss the dynamic of morality debate in relation to public policy and law in Indonesia and then the last explore the concept of public morality. Other than that, this research continues to seek the dynamic of public morality debate and how significant it influences people.

Blackwood is one of those discussing how sexuality is regulated or is attempted to be, in Indonesia, based on normative gender through law and institution that is implemented in grass-root level. One concept that has been dominant in the debate was morality, as Indonesians, religious citizens, easterners, derived from religious

value. She categorizes three different eras of sexuality discourse, such as Suharto era where the state attempted to control sexuality through a deployment of gender, during 1990s in which state-Islamic discourse of sexuality shifted as a response to international pressure on same-sex marriage and equality right. The last is the period following Suharto collapse where conservative Islamic minority pushed the stricter law, demanding the state to take part in controlling sexuality, based on morality values.<sup>5</sup> This study helps us comprehend how sexuality discourse has been discussed since 80s and been manifested into public policy and law. However, the current debate that once more rose indeed has its own context, and studying it leads us to understand why it is raised again and has not yet been passed for a very long time? Why now? Is there a power shift among Muslims civil society and actors? Thus, our study seeks to continue Blackwood's and to answer those questions.

Furthermore, public morality and the so-called moralizing project is not unique in Southeast Asian countries after world war II, as Platt contended. Moralizing project is to build a nation based on morality derived from religious teachings implemented through families as well as other institutions. Through family institution, people play gender roles in families meaning they have to be heterosexuals, and have children. The permissible sexuality is only within marriage. One of her main point was that morality was the act of impetus of Indonesian reformation, which means it has opened moralizing project opportunity, where earlier, New Order was considered immoral, looking at the corruption, power abuse, and mass rape happening at the end of the regime. This sort of moralizing project takes place in public sphere, as a moral debate, such as in formal politics, government institutions, universities, and medias. Lot of the debates consisted of female body as an issue and she described that women are considered as a threat, as represented by the virginity test for Indonesian female police, for instant.<sup>6</sup> This gives us wonderful illustration of how the massive moralizing project emerged as the impetus of reformation. It is true that Islamic symbols are more visible following the downfall of New Order, as part of Islamization, in which many Muslims activism were restricted by Suharto, earlier. This religion has been becoming

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<sup>5</sup> Blackwood, "Regulation of Sexuality in Indonesian Discourse."

<sup>6</sup> Maria Platt, Sharyn Graham Davies, and Linda Rae Bennett, "Contestations of Gender, Sexuality and Morality in Contemporary Indonesia," *Asian Studies Review* 0, no. 0 (January 10, 2018): 1-15, <https://doi.org/10.1080/10357823.2017.1409698>.

source of morality values and law, as also part of Islamization. As Ricklefs argued, what happen now in Indonesia is the contestation of interpreting the true Islam.<sup>7</sup> When Abdurrahman Wahid became president, he was the first to use religious morality as political legitimation to solve the previous problems. Thus, democratization was inseparable from debates over public morality in universities, the media, informal politics, and government.<sup>8</sup> This shows how Southeast Asia has different context of democratization from those the west, especially Europe, such as French and England. The religious resurgence that Hefner and others described has accompanied modernization and democratization.<sup>9</sup> Platt's work gives us the context and history beyond this moralizing project.

Similar to which Brenner draw that there were two movements taking place after reformation, regarding moralizing project, using Platt's term, which are Islamic and democracy and human right movement. The first one insisted that the previous regime, New Order, was immoral so that Indonesia should be based on the new moral order, taken from Islamic morality values. Lots of debate are about sexuality and female body. This then led private morality took place in public sphere, as she contended.<sup>10</sup> However, we notice that how she and lots of westerner perceive private morality is different from how it is understood in Islamic or religious society. The morality is indeed a public matter, for those of many Muslims. Whom you have sex, when, and how are questions of public morality, perceived as public matter by many Muslims, considering sharia they understand. Meanwhile, this study gives us overview about the contestation of two movements and shows the dynamic of contestation.

The second category is public morality as an important concept to comprehend how and why many Indonesians, such as activists, politicians, and religious preachers problematize *zina* definition in the Penal Code and then demanded its revision, even though the draft has been discussed since 80s. An illustration by George helps us understand what public morality is and how it is implanted and argued by people.

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<sup>7</sup> Merle Calvin Ricklefs, *Islamisation and Its Opponents in Java: A Political, Social, Cultural and Religious History, C. 1930 to the Present* (HAWAII/University of Hawaii Press, 2012).

<sup>8</sup> Platt, Davies, and Bennett, "Contestations of Gender, Sexuality and Morality in Contemporary Indonesia."

<sup>9</sup> Hefner, "Religious Resurgence in Contemporary Asia."

<sup>10</sup> Suzanne Brenner, "Private Moralities in the Public Sphere: Democratization, Islam, and Gender in Indonesia," *American Anthropologist* 113, no. 3 (September 1, 2011): 478-90, <https://doi.org/10.1111/j.1548-1433.2010.01355.x>.

He interestingly analogized it to public health in which private activities done by people might have public consequences. For example, a big company that pollute the air might harm people's health. Hence, it should be outlawed to protect people's health for public good. This is public health. Pornography is private and individual choice made by the actors and those of consumers, yet harms people's character, human goods, and institution of marriage. However, he continued differing both that people are unable to avoid pollution, while able to avoid pornography by declining to purchase to look at it<sup>11</sup>. After all, he considered public morality as important part of discussion and should always be, before producing public policy and law.

Another important work by Christopher F. Money questions how far and much morality should be dealt with in making a law. He contended that the legislatures indeed should deal with it, yet should not morally desirable. This means the law should minimally take morality as necessity for the health of functioning of social order. He also added that the bad law is that which is morally dealt with yet disobeyed by most citizens since no means unless it works well in most cases. Interestingly this differs from *Fiqh Jinayah* perceiving *zina* as a crime, which indicates the disputing concepts between Islamic law and the law purposed by Money. This gives us lots of learnings, looking at how Islamic law ideal standard of sexuality, taken into law in many Muslims majority countries, is highly concerned on morality even though its enforcement and implementation are undergoing criticism, as Ziba Mir Husseini explained above. Whereas the latest one argues that morality is a minimum standard, insisting the good law is the one well implemented, without too high standard of morality. This then reminds us to Grand Gilmore saying,

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In heaven there will be no law, and the lion shall lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In hell there will be nothing but law, and due process will be meticulously observed.<sup>12</sup>

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<sup>11</sup> Robert P. George, "The Concept of Public Morality," *The American Journal of Jurisprudence* 45, no. 1 (January 1, 2000): 2, <https://doi.org/10.1093/ajj/45.1.17>.

<sup>12</sup> Grant Gilmore, *The Ages of American Law: Second Edition* (Yale University Press, 2015), 60.

As mentioned above that this study continues Blackwood's and other's work in the first category, on regulation, public policy, and sexuality. However, non-of those works discussed the current debate on *zina* definition expansion in Indonesian Penal Code Draft, in which lots of Indonesians intellectuals, law experts and activists had agreed its expansion, due to insignificance of the old definition, as shown by the media. Meanwhile, as time changes, society and politics indeed changes, indicated by the Islamic symbols that are more visible. This shows us the significance of studying the phenomenon in order to see the dynamic of power exercising among groups, especially socio-religious movement. Thus, we insist this research is significant and contributes to the field of religious, gender, and law studies. Furthermore, this study helps us understand the dynamic of sexuality discourse and how public morality is used to shape and shift the law and public policy

## **PUBLIC MORALITY AND ZINA REDEFINITION**

This section examines the public legal construction of proposing *zina* redefinition in the Penal Code. Furthermore, it argues that morality taken from religious values is that inspires the attempt and it leads them insist on including it in the law, that eventually becomes public matter. However, how do they build the argument? How do certain moral values taken from religious teachings become public matter in this plural society? Why? In so doing, this chapter explores this ongoing process, defined as morality project mentioned by previous scholars, considering the concept of public morality in which certain values are insisted to be public matter included in the law and public policy.

Scholars, and activists were agreeing and disagreeing with the position this Islamic group seeks to impose on Indonesia's plural society. It is clear that both its proponents and critics are much inspired by morality and ideas of the common good based on religious teachings. This kind of morality values that people have been insisting on implementing it through public policy and law is well-known as public morality. Besides, the issue on public and private notion is related to Sharia and law in Indonesia, where Islamist groups have been struggling on including *sharia* into national law within plural society, since the controversy over the Jakarta Charter at the time

of Indonesia's independence. Moreover, after New Order regime collapse, local *sharia* regulations have significantly increased.<sup>13</sup>

The respond then shows us at least two different groups that oppose and support the proposal and Court's decision. Then we shall call the first as religious moralists, second is liberals. Moreover, as rejected by Constitutional Court, Dian Kartika Sari, an Indonesian Women Coalition member, stated that The Court has won "the common sense" while quoting Budi Munawar Rahman as an expert witness that families are a place for love and forgiveness for adultery perpetrators and non-heterosexual people. Furthermore, Lies Marcoes, a feminist and Muslim scholar, contended FLA demand would endanger citizens' private lives, in which state should not intervene. This kind of intervention would repress citizen private matter that has nothing to do with others, instead of protecting them. While FLA has based their demand on the idea of morality, arguing that society has undergone morality degradation. Soon this issue felled Indonesian medias and one of the most famous TV program, Indonesian Lawyer Club TV One, held live discussion on it inviting activists from both sides, law experts, scholars, and religious preachers. It is one of programs that actively present this kind of issue.

What is interesting is that this discussion happened since 80s yet never have passed and is becoming a hot topic at the end of 2017 till the beginning of 2018. In this context, Blackwood has contended that there was moral panic going on and led people to discuss it, even though the law has never passed. But, why did it reappear? Why now? Let us back to the time before the Indonesian Constitutional Court rejected the demand. It was 2016 when the groups of activists proposed to redefine *zina* in the Penal Code, and the Court process started in June 20th 2016. The court rejected the demand on December 14th with dissenting opinions, arguing that adding the new norm or phrase is outside its jurisdiction, if the lawsuit is granted, the offense by complaint would change into the usual offense leading to state's intervention.

Several actors involved in the debate were FLA (Family Love Alliance), Women Coalition, scholars, parliament members, and politicians with either secular humanistic or religious moralistic arguments. Dian Kartika, FLA Chief for instant, contended that this demand is to protect the family values in Indonesia from immorality of

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<sup>13</sup> Liston P. Siregar, "Mengapa Perda Syariah Bermunculan Di Indonesia Sejak 1998?," *BBC Indonesia*, February 21, 2017, sec. Indonesia, <http://www.bbc.com/indonesia/indonesia-39033231>.

sex outside marriage and same-sex intimacy. This arguments is clearly based on morality taken from religious teachings. Women coalition who have secular feminist approach insisted on separation between public and private matter in which *zina* definition proposed by the FLA, which I describe as religious moralists, is a domestic matter. Debating over domestic matter means too much interfering citizens' private lives. Hence this debate, the discourse on gender and sexuality and its regulation in Indonesia, is a contesting hegemony of secular and religious ideas.

George made a very helpful analogy of public morality with public health, such as regulating companies to avoid causing public pollution, for instant. The pollution endangers societies health as well as immorality threatens society ideology and way of lives. From this stand point then people in modern democratic countries insist on proposing certain values to be embodied in the body of law, with the struggle within constitutional framework. We can see how actors proposing the *zina* definition expansion in the Penal Code saw the immorality represented by free sex and same sex behaviors have threatened their ideologies, values, and way of lives.

It is clear that the arguments of those proposing the redefinition of *zina*, such as AILA, is based on morality derived from religious values, as mentioned in the Constitutional Court and the media.. As contended, this is to protect family values and morality of the nation. Euis Sunarti, one of the pleaders of Judicial Review contended that many people including the youth and children have done sex outside marriage and same sex relationship, based on her survey in Bogor. She said that if there is no law or public policy as an instrument covering this problem, Indonesia can be unsafe place for families and children as the next nation generation. So how could we protect our families and children from immorality? The law covering on *zina* matter based on the concept we proposed will give a conducive milieu for us to express religiosities and to rise good children (*anak sholeh*). Moreover, the leader of pleaders team, Feizal Syah Menan tried to argue within Pancasila framework claiming that his team is *Pancasilais* who want to protect this country from immorality. He questioned whether the article 284, 285, and 292 are compatible with Pancasila since the first principle is believe in God, meaning religion is one of law resources in Indonesia. It has been proven during the court process that the

articles above are incompatible with all religions and customary law in Indonesia.<sup>14</sup>

This argument indicates a moral panic that has occurred in which the condition, episode, individual or groups emerging are defined as threats to socio-cultural values and interest. Cohen called those starting the panic as “Moral entrepreneurs” and “Folk devil” for those perceived as threats.<sup>15</sup> Moral panic leads people to the attempt to construct public morality, and included in the law to be a norm. Besides this shows us that this community needs the state to help them create a good milieu to be religious. This leads us to a classic question, “Do religious society, especially Muslims in this context, need state’s help to be religious?” Or “Do they need a theocratic state?”

However, the fact is more complex than that since *zina* concept purposed by the pleader is based on Islamic law definition, interpreted by the Qur’an, although they also based it on another customary law. In this context, it is necessary to categorize which one is law on the one hand, and the morality on the other. So I think it is significant to consider the old work by Mooney discussing morality and law in which he contended that the legislature should deal with morality in producing the law, yet not every morality must be made into law. In this respect, there is living morality as norms embodied and implemented by the society either made or not made into the law. He added the law should not deal with everything morally desirable, for it should be the minimum standard for the sake of functioning of social order. The bad law is that which is morally ideal yet not obeyed by the most citizens because no means unless it works well in most cases.<sup>16</sup> So proposing *zina* redefinition is basically not only based on morality values but also *fiqh jinayah* (Islamic Penal Code). Should Muslims majority in Indonesia include this concept into the Indonesian Penal Code? Apart from this, we understand that this kind of moral panic is an indication on the one being afraid of immorality which leads him or her to demand it to be all people’s, state’s, and individual matter, which is public morality.

Furthermore, the pleaders also put the medical reasoning into account where the classic debate over sexuality happened in which *zina* and same-sex relation are perceived as those contributing to the

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<sup>14</sup>IndonesiaLawyers Club tvOne, “Benarkah MK Melegalkan Zina Dan LGBT?” [Part 1] - Indonesia Lawyers Club ILC tvOne, n.d., <https://www.youtube.com/watch?v=gfPjXotNf3E&t=331s>.

<sup>15</sup> Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (St. Albans, Eng.: Paladin, 1973).

<sup>16</sup> Christopher F. Mooney, “Public Morality and Law,” *Journal of Law and Religion* 1, no. 1 (1983): 45–58, <https://doi.org/10.2307/1051072>.

increasing numbers of HIV/AIDS case. This is somehow bias according some of repellents, claiming that safe sex concept may answer that sort of problematization which is based on medical reasoning. This account then leads to the question "Do we have to blame LGBT for the spread of Sexual Transmitted Disease or to practice safe sex? This question represents at least two ways of thinking, first is religious moralists and the last is liberalists.

## CONCLUSION

The public construction of legal argument on *zina* redefinition is led by morality values and Islamic law conception of *zina* itself. The proposal to redefine it is caused by moral panic emerging within society, especially among religious moralists, where certain individual or groups are perceived as a threat to societal values, culture, ideology, and the nation. Thus, the morality value that is considered to be threatened has led them to include it into the law, called public morality. It is the morality that must be public matter and concern so the law should cover it, for example pollution by company that endangers society which then should be regulated, as Goerge explained.

Furthermore, I also found the Islamic law conception on *zina*, which is religious argument, and other customary law regarding *zina* definition, have become a framework leading this proposal. Hence, this is a contestation between western penal code conception inherited by the Dutch and the local and religious conception. This also leads to the debate whether one's sexual relationship is private or public matter, and should the state intervene this kind of one's sexual relationship.

The last is medic reasoning which brings us to classic debate about whom to blame regarding the spread of HIV/AIDS and other Sexual Transmitted Diseases. This, as usual, was countered by those rejecting the proposal by the idea of safe sex, since simply arguing that LGBT sexual behaviors and sex outside marriage are those contributing to the spread of those diseases is considered as not solving the root of the problem. Marriage people will suffer the diseases if not practicing safe sex. So the idea beyond it is safe sex, as argued by those rejecting the proposal.

Hence, this becomes public morality, since they perceive that the premarital sex and LGBT sexual behavior are perceived as unhealthy and lead to *fasadah* so they are immoral and threatening the family and Indonesia. This is the moral panic which leads them to insist on making this morality and law positive law in Indonesia, as Muslims majority country.

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