



**PUNISHMENT OF CRIMINAL ACT OF ACCUSING ADULTERY
(QADZAF) IN INDONESIAN POSITIVE LAW:
PERSPECTIVE OF MAQAŞID AL-SHARIA**

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Abstract: Amid the hectic new social space (virtual space), mediated reality, and an era of disruption, the truth of information spread via media is hard to determine, especially with the outbreak of hoaxes that have become a trending issue the past few decades. Hoaxes are a virtual crime, an act committed via the spread of false stories. Hoaxes can be in the form of accusations of another person committing an immoral act and defamation (assassination character), in this case, accusing another person doing adultery. The author argues that the issue of the criminal act of accusing adultery (*qadzaf*) in positive Indonesian law is significant to be studied since provisions of positive Indonesian law, as stated in Criminal Code, do not specifically discuss the criminal act of accusing adultery (*qadzaf*). This study aimed to analyze the problem of the criminal act of accusing adultery (*qadzaf*) in positive law by using *maqāşid al-Sharia*. The study is library research conducted by examining materials from the main book relating to problems and other supporting qualitative research studies. This research employed a descriptive-analytical method by describing the legal materials obtained, and then they were analyzed using *maqāşid al-Sharia*. The research results showed that punishment for the perpetrator of a criminal act of accusing adultery (*qadzaf*) as regulated in Article 310 paragraph (1) of the Criminal Code is a maximum imprisonment of nine months and or a maximum fine of four thousand and five hundred rupiahs. The aspect of *darūriyyāt* about punishment for perpetrators of accusing adultery (*qadzaf*) is the protection of honor (*hifz al-'ird*). This aspect relates to everyone's honor that must be protected. Through the legislative institution, a country needs to reconstruct the Criminal Code into a better law, such as revising a particular chapter that has not fulfilled a sense of justice in eradicating crime very disturbing society since a policy must righteously be able to settle the problems in society. Based on the changes in law, following the development of social life and technology today is inevitable.

Di tengah riuhnya ruang sosial baru (ruang virtual), realitas yang termediasi, era disrupsi, kebenaran informasi yang tersebar *via* media sangat sulit ditentukan,

apalagi dengan menyeruaknya *hoax* yang sejak beberapa dekade belakangan menjadi tren isu. *Hoax* menjadi bentuk kejahatan virtual; suatu tindakan yang dilakukan *via* penyebaran cerita palsu, dapat berupa tuduhan orang lain melakukan tindakan buruk, dan pencemaran nama baik (*assassination character*); dalam hal ini menuduh orang lain berbuat zina. Penulis berpendapat bahwa persoalan tindak pidana menuduh zina (*qadzaf*) dalam hukum positif Indonesia penting dikaji mengingat dalam ketentuan hukum positif Indonesia sebagaimana yang terdapat dalam KUHP tidak membahas secara khusus mengenai tindak pidana menuduh zina (*qadzaf*). Penelitian ini bertujuan untuk menganalisis persoalan tindak pidana menuduh zina (*qadzaf*) dalam hukum positif dengan menggunakan *maqāṣid al-Sharia*. Jenis penelitian yang digunakan adalah penelitian pustaka, yaitu penelitian yang dilakukan dengan menelaah bahan-bahan dari buku utama yang berkaitan dengan masalah dan buku penunjang lainnya yang berkaitan dengan kajian penelitian yang bersifat kualitatif. Metode penelitian yang digunakan bersifat deskriptif analitis dengan cara menguraikan bahan hukum yang diperoleh, selanjutnya menganalisis dengan menggunakan pisau analisis *maqāṣid al-Sharia*. Hasil penelitian menunjukkan bahwa sanksi bagi pelaku tindak pidana menuduh zina (*qadzaf*) sebagaimana diatur dalam Pasal 310 ayat (1) KUHP adalah pidana penjara paling lama sembilan bulan dan atau denda paling banyak empat ribu lima ratus rupiah. Aspek *ḍarūriyyāt* yang berkenaan dengan hukuman bagi pelaku menuduh zina (*qadzaf*) adalah aspek perlindungan terhadap kehormatan (*ḥifẓ al-'ird*). Aspek ini berkaitan dengan kehormatan setiap orang yang harus dilindungi. Negara melalui lembaga legislatif perlu melakukan restrukturisasi KUHP kepada hukum yang lebih baik agar dapat tercipta suatu hukum yang baik, seperti melakukan revisi terhadap pasal tertentu yang dianggap masih belum memenuhi rasa keadilan dalam rangka memberantas kejahatan yang sudah sangat meresahkan masyarakat, karena sebuah kebijakan selayaknya harus mampu menjawab masalah dimasyarakat. Pada dasarnya perubahan undang-undang merupakan sebuah keniscayaan dalam rangka mengikuti perkembangan kehidupan sosial masyarakat dan teknologi saat ini.

Keywords: *Indonesian Positive Law; Qadzaf; Maqāṣid Al-Sharia.*

INTRODUCTION

A human being is a creature having a position of glory higher than other creatures. Allah has granted humans a perfect form of mind to perform the mission as a caliphate on earth. Therefore, as creatures having a higher position, human beings should not condescend or humiliate other humans and creatures similarly created by Allah. Humans are forbidden from condescending to others, including reproaching, gossiping, or accusing vile for others, such as slander shown to others without valid evidence. Also, accusing adultery (*qadzaf*) of good people is lousy behavior leading to a great sin.¹

Al-Ghazali broadens and deepens terms actions carried out by someone in the form of defamation, namely statinginsulting (degrading) words to other people

¹ Abdur Rahman I Doi, *Tindak Pidana dalam Syari'at Islam* (Jakarta : PT Rineka Cipta, 1992), 48-51.

in public.² Data from the Supreme Court of the Republic of Indonesia showed that during the vulnerable period of 2020 to April 2021, there were around 1456 cases of insult that had received permanent legal decisions from the court. These numbers are spread throughout the territory of Indonesia.³

Indonesia applies Positive law arranged in The Criminal Code and The Criminal Procedure Code arranging the criminal action of accusing adultery (*qadzaf*) categorized as a criminal act of humiliation. According to Article 310 Paragraph (1) of the Criminal Code, the perpetrator did a criminal act of defamation of someone publicly. This is a threat of defamation (to ruin someone's good name). Accordingly, the perpetrator will be imprisoned for maximally nine months or charged with a criminal fine of maximally four thousand and five hundred rupiahs.⁴ This article aims to make everyone respect other people's rights and not slander that can ruin other people's reputations.

Things associated with criminal action of accusing adultery (*qadzaf*) are categorized as humiliation in positive Indonesian law, and this is also listed in Article 311 Paragraph (1), Article 331 Paragraph (1), Article 317 Paragraph (1) of The Criminal Code. The elements in Article 317 paragraph (1) are objective. The objective element is filing a complaint or information of someone whose honor is attacked by the authorities, either in writing or verbally. The subjective element is deliberate.

Provisions in positive law are not the same as the punishment for the perpetrator accusing adultery (*qadzaf*) in Islamic criminal law. However, punishment has been listed in the Criminal Code to protect and respect human dignity to not condescend to and slandering to each other.

According to provisions in Islamic criminal law, everyone accused of adultery gets a great sin and is obligated to be lashed with a whip. Independent people are punished with eighty times whiplashing, while slaves are punished with forty times whiplashing. Furthermore, requirements of people accused of adultery and who have been punished by eighty times whip lashing are having sensible or *baligh*; they are not mother, not father or grandmother and forth of accused ones; accused people are a Muslim; the accused people are already adults, sensible, independent, and care from good people.⁵

Islamic criminal law views that witnesses need to find solutions in deciding cases. The case of *qadzaf* (accusing adultery) requires four witnesses to testify

² Abdul Hamid Al-Ghazali, *Ihya'ul Ulumuddin* (Ciputat: Lentera Hati, 2003), 379, See also Imam Jalaluddin, *Tafsir Jalalain* (Bandung: Sinar Baru Algesindo, 2010), 428.

³ <https://putusan3.mahkamahagung.go.id/search.html?q=penghinaan> accessed 1 May 2021.

⁴ Look at Article 310 Paragraph (1) The Criminal Code (KUHP).

⁵ Sulaiman Rasjid, *Fiqh Islam* (Bandung : Sinar Baru Algesindo Bandung, 2010), 438.

before the court.⁶ Opinion of the Fuqaha that testimony of a person who has accused other people of doing adultery in another matter is unacceptable because he has done something causing wickedness. Thus, he was considered unfair, while justice is one of the conditions for receiving a person's testimony. Finally, someone needs to have repentance in order for his testimony can be accepted.⁷

A person can be said to be breaking the law when he or she intentionally or unintentionally violates applicable law. Then, he or she will be examined in court. Whether or not the defendant has committed the act accused to him should be proven.⁸ Evidence, in a broad sense, is the ability of the defendant or plaintiff to utilize the law of evidence to support and justify legal relationships and events denied in the related law. Meanwhile, in a narrow sense, the proof is only needed as long as matters are disputed or things are still in the dispute or only as long as there are disputes between the parties in dispute.⁹

The criminal act of *qadzaf* includes two rights that classify *qadzaf* as a criminal act, including the aspects of human values and the correlation with divine values, making *qadzaf* very prohibited. According to Imam Abu Hanifah, in violation of *qadzaf* actions, Allah's rights (rights of the people/society) and humans (individuals). Therefore, even though the criminal act of *qadzaf* is not reported to the court (judge) or is not reported by a person who is the object of *qadzaf* (*maqzuf*), *had qadzaf* must continue to run and not be affected by the forgiveness from the victim (*maqzuf*).¹⁰ Imam Asy-Shafi'i argued that *qadzaf* is a criminal act in which it has dominant rights to humans (individuals) than rights of the masses (society). Therefore, perpetrators of *Jarimah qadzaf* can be freed from punishment if they receive forgiveness from the victim (*maqzuf*) even though the report has entered the court.¹¹

Hambali school of thought also has the same opinion as the Syafi'i school of thought. The case of *haqul adamiyyin* (human rights) is more dominant in *qadzaf* cases. The form of *qadzaf* punishment can be inherited to the heirs of the suspect if the accuser of *qadzaf* (*qazif*) has passed away. Maliki school has disagreed over this matter. The first opinion has the same opinion as to the Asy-Syafi'i school, stating that *haqqul adamiyyin* (human rights) is more dominant than rights of Allah (rights of people) so that there is an element of forgiveness for perpetrators of

⁶ Ibnu Qayim Al-Jauziyah, *Al-Thuruq al-Khukmiyyah fi al-Siyasah al-Syar'iyah*, translated by Adnan Qahar, *Hukum Acara Peradilan Islam* (Yogyakarta : Pustaka Pelajar, 2006), 228.

⁷ Sayyid Sabiq, *Fiqh Sunnah*, translated by Muhammad Nabhan Husein (Bandung : PT Al-Ma'arif, 1990), ed. V, Vol. IX, 155.

⁸ Ibnu Qayim Al-Jauziyah, *Al-Thuruq al-Khukmiyyah fi al-Siyasah al-Syar'iyah*, 2.

⁹ Yahya Harahap, *Pembahasan Permasalahan dan penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali* (Jakarta: Sinar Grafika, 2000), 273.

¹⁰ 'Ala' Ad-Din Al-Kasani, *Badai' Ash-Shanai' fi Fi Tartib Asy-Syara'i*, Vol. VII, (Beirut: Daar AlFikr, 1996), 77.

¹¹ Wahbah Az-Zuhaili, *Fiqh Islam wa adillatuhu*, Vol. VI, (Damaskus: Daar Fikr, 1989), 81.

criminals (*Jarimah*) of *qadzaf*. The second opinion argues that there is an element of forgiveness in the *qadzaf* finger.

In contrast, the finger has not been reported to the court (judge), so that this is still classified as an individual right. However, when the report has been submitted to the court (judge), this is already within the scope of the realm of God's right and has no elements. Substantially, even though the victim has been forgiven but punishment is still running as it should be.¹²

Nevertheless, many scholars have different opinions regarding the rights of Allah (rights of people) and *haqqul adamiyyin* (individual rights) in the context of the criminal act of being accused of adultery (*qadzaf*). In this case, there is an agreement of the need for complaints or reporting of criminal acts of *qadzaf* against the accused one (*muqzif*) as a condition for the fall of the *qadzaf* finger. Complaining one may not be represented by other people, but an expert in his lineage may guard him. A person owning the right to complain is accused one (*muqzif*). When accused, one dies. According to an Islamic scholar, Imam Abu Hanifah, the claim of ones complaining was null and void because it is solely right of Allah. It does not have property value so that it cannot be inherited. However, according to Iman Malik, Imam Asy Syafi'i, and Imam Ahmad, the right to complain can be inherited from heirs. However, if the accused does not have an heir, the claim reported is null and void.¹³

The author argues that the criminal act of accusing adultery (*qadzaf*) in positive Indonesian law is significant to study considering that provisions of positive Indonesian law, as stated in the Criminal Code, do not specifically discuss the criminal act of accusing adultery (*qadzaf*). The author focuses on examining criminal sanctions of accusing adultery (*qadzaf*) in positive Indonesian law and analyzing provisions of this punishment using *maqāṣid al-Sharia*. The author of this study investigates provisions of the criminal act of accusing adultery (*qadzaf*), then he analyzes those provisions by using *maqāṣid al-Sharia*. Based on the background described above, there are several main issues answered through this research, namely: first, what are provisions of the criminal act of accusing adultery (*qadzaf*) in positive Indonesian law?, second, how is an analysis of *maqāṣid al-Sharia* on provisions of the criminal act of accusing adultery (*qadzaf*) in positive Indonesian law?

Some previous research has studied the criminal act of accusing adultery (*qadzaf*). For example, first is the research applied by Ainun Mardiyah with the title *Qadzaf in the form of Kinayah (Study of Islamic Criminal Law Analysis)*. Her research results explained that the concept of *jarimah qadzaf* consists of two parts,

¹² Muhammad Ibn Rusyd, *Bidayatul Mujtahid*, Vol. II, (Damaskus: Daar Fikr, tt), 331.

¹³ 'Ala' Ad-Din Al-Kasani, *Badai' Ash-Shanai' fi Fi Tartib Asy-Syara'i*, Vol. VII, 81-82.

namely *jarimah qadzaf* having a clear interpretation of word and *jarimah qadzaf* using innuendo interpretation of word (*kinayah*). How to prove *jarimah qadzaf bil kinayah* is identified from the form of recognition (*iqrar*) by the perpetrator, and form of writing, such as accusation in printed media, electronic (internet) media, and indication (*qarinah*).¹⁴

The second example is research conducted by Muhammad Agus Prasetyo with the title *Comparative Study on Proving the Crime of Accusing Adultery (Qadzaf) According to Islamic Law and Positive Law*. His research results showed that there were differences in proving between the Islamic and favorable laws. Based on Islamic law, the perpetrator of a criminal act or *jarimah* accusing adultery (*qadzaf*) is sentenced to eighty times whiplashing. Meanwhile, based on positive Islamic law, the perpetrator of *qadzaf* is punished by maximally four years imprisonment.¹⁵

Previous research focused on punishment and proof of adultery crime, both favorable and Islamic criminal laws. However, this topic has not been analyzed using *maqāṣid al-sharia* approach. According to the author, this *maqāṣid al-sharia* approach distinguishes this research from the results of previous studies. The researcher selected library research conducted by examining materials from the main book related to problems and other supporting qualitative research studies. This research used the descriptive-analytical method toward how to describing legal material obtained, then analyzing them using *maqāṣid al-Sharia*.

PERSPECTIVE OF MAQĀṢID AL-SHARIA

In structure language of Arab, *maqāṣid al-Sharia* consists of two words that are *maqāṣid* and *maqāṣid al-Sharia* is a form of plural from *maqshad*, *qāṣd maqṣid* or *quṣud* is a form of the word from *qāṣada*, *yasqudu* with diverse of meaning such as direction, destination, middle, fair and not exceeded the limit.¹⁶ Meanwhile, *sharīa*, in language, means the road to the water source. The road to a water source can be associated with the primary source of life.¹⁷

Syatibi divided *maqāṣid al-Sharia* to become tree levels of *maqāṣid* or legal purposes, it's called *maqāṣid al-Sharia*. *Maqāṣid al-Sharia* is something that must exist for survival (life sustainable) being human. If only something does not exist, human life will be destroyed. Purpose of *ḍarūri* that aims to protect religion (*hiḍ*

¹⁴ Ainun Mardiyah, "Qadzaf dalam Bentuk Kinayah (Studi Analisis Hukum Pidana Islam)", *Essay*, Sumatera Utara Medan, 2019.

¹⁵ Muhammad Agus Prasetyo, "Studi Komparatif Tentang Pembuktian Tindak Pidana Menuduh Zina (Qadzaf) Menurut Hukum Islam dan Hukum Positif", *Essay*, Fakultas Syari'ah dan Hukum UIN Walisongo Semarang, 2017.

¹⁶ Ahmad bin Muhammad bin 'Alī al-Fāyūmī al-Muqri, *al-Mishbāh al-Munīr fī Garīb al-Syarh al-Kabīr li ar-Rāfi'ī*, 192 in Ahmad Imam Mawardi, *Fiqh Minoritas Fiqh Al-Aqlliyāt dan Evolusi Maqāshid asy-Syari'ah dari Konsep ke Pendekatan*, ed. I, (Yogyakarta: Lkis, 2012), 178-179.

¹⁷ Asafri Jaya Bakri, *Konsep Maqasid Syariah Menurut As-Syatibi* (Jakarta: PT Raja Grafindo Persada, 1996), 61.

ad-dīn), protection of soul (*ḥifz an-nafs*), protection of reason (*ḥifz al-'aql*), protection of property (*ḥifz al-māl*) and protection of respectability.¹⁸

Maqāṣid al-ḥājjīāt is something where is needed for human beings' survival. If only something did not exist, human life would not experience destruction, but trouble will hinder it. Subsequently, *maqāṣid al-taḥsīniyyāt* is absence something decorative-ornamental which will not destroy for purposing of *ḍarūri* but the presence will beautify achievements for purposing of *daruriat*.¹⁹ The third benefit (kemaslahatan) above has related tightly to one another, especially side of function it. *Ḍarūriyyat* is the main priority, *ḥājjīāt* is complemented the main one and *taḥsīniyyāt* is perfect all of it. *Ḍarūriyyat* have a position as fundamental by necessity *ḥājjīāt* and *taḥsīniyyāt*.²⁰

Maqāṣid ad-ḍarūriyyāt is something that must exist for the continuation of human life, which consists of saving religion (*ḥifz ad-dīn*),²¹ save souls (*ḥifz an-nafs*), save wits (*ḥifz al-'aql*), save treasure (*ḥifz al-māl*), save offspring or self-respect (*ḥifz an-nasl*).²² *Ḍarūriyyāt*²³ serves as basis for the need for *ḥājjīyyāt* and *taḥsīniyyāt*.²⁴ *Maqāṣid al-ḥājjīyyāt* is something that's needed for the continuation of human life, but if its existence does not exist, then human life will not experience destruction. *Maqāṣid at-taḥsīniyyāt* is something whose presence will beautify the attainment of the goal of *ḍarūri*.²⁵

Contemporary classifications divide *maqāṣid* into three levels:

- a. General *maqāṣid* (*al-maqāṣid al-'āmmah*), namely *maqāṣid* that can be explored in all parts of Islamic law.
- b. Specific *maqāṣid* (*al-maqāṣid al-khāṣṣah*), namely *maqāṣid* that can be observed throughout the contents and chapters of particular Islamic law.
- c. Partial *maqāṣid* (*al-maqāṣid al-juz'īyyah*), namely the intentions behind a particular verse or law.²⁶

In order to correct shortcomings of classical *maqāṣid* theory related to reaching of person that is covered, namely individual, the idea of *maqāṣid* by contemporary Muslim scholars was expanded to include a broader range of

¹⁸ Ali Sodiqin, *Fiqh Ushul Fiqh* (Yogyakarta: BERANDA, 2012), 174.

¹⁹ Yudian Wahyudi, *Maqasid Syari'ah dalam Pergumulan Politik*, ed. IV, (Yogyakarta: Pesantren Nawesea Press, 2014), 29-30.

²⁰ *Ibid.*

²¹ Look at Yusuf Al-Qaradawi, *Dirasah Fi Fiqh Maqāṣid asy-Shari'ah*, ed. III, (Kairo: Darus Syuruq, 2007), 19.

²² Ahmad Al-Mursi Husain Jauhar, *Maqasid Syariah*, ed. II, (Jakarta: AMZAH, 2010), xiii.

²³ See explanation about *ḍarūriyyāt* in Jalaluddin Muhammad Bin Ahmad Al-Muhalli Asy-Syafi'i, *Sarh Al-Waraqat Fi Uṣūl Al-Fiqh* (Beirut; Darul Kudsi, 1999), 81.

²⁴ Ali Sodiqin, *Fiqh Ushul Fiqh*, 174.

²⁵ Yudian Wahyudi, *Maqasid Syari'ah dalam Pergumulan Politik*, 29-30.

²⁶ Jasser Auda, *Maqāṣid al-Shari'ah as Philosophy of Islamic Law A Systems Approach* (Washington: The International Institute of Islamic Thought London, 2007), 5. Look at Jasser Auda, *Membumikan Hukum Islam Melalui Maqashid Syari'ah* (Bandung: PT. Mizan Pustaka, 2015), 11.

humans including society, nation, and even Muslims.²⁷ Jasser Auda divides *maqāṣid sharia* into six system features used as a tool of analysis, namely cognitive dimensions of religious thought, wholeness, openness, and a hierarchy of thinking that influence each other (interrelated hierarchy), religious thinking that involves various dimensions (multidimensionality) and purposefulness. These six features are closely related, semipermeable, and related to one another, thus forming a whole system of thinking.²⁸

Maqāṣid al-sharia in meaning *maqāṣid ash-shari* contains four aspects where the first goal from Sharia is a benefit for humans in the world, and hereafter, sharia as something must be understood, Sharia as something legal of taklif should be done. Furthermore, a destination of Sharia is that it brings humans to the protection of the law.²⁹ First aspect related with payload and essence of *maqāṣid al-sharia*. The second aspect is related to the dimension of language in order to be able to understand with the result that achieved benefit something to contain it. The third aspect is related to the implementation of shariah provisions in setting to manifest benefit.³⁰ In writing it, the writer used the theory of *maqāṣid al-sharia* as an instrument to analyze criminal punishment act accused adultery in positive Indonesian law.

PROVISION OF CRIMINAL ACT ACCUSED ADULTERY (QADZAF) IN INDONESIAN POSITIVE LAW

Someone accused adultery (*qadzaf*) in positive law interpreted as something deed intentionally that showed or threw accusations action of sexual intercourse between male and female. According to positive law in Indonesia, accused adultery is considered insulting, such as in article 310 KUHP.

- (1) Anyone who deliberately attacks someone's honor or name by accusing him of something known to the public is punished for defamation by a maximum imprisonment of nine months or a maximum fine of four thousand and five hundred rupiahs.
- (2) Suppose this is done in writing or pictures broadcast, shown, or posted in public. In that case, he will be punished for defamation with a maximum imprisonment of one year and four months or a maximum fine of four thousand five hundred rupiahs.
- (3) It does not constitute defamation or written defamation if the act is committed in the public interest or because it is compelled to defend oneself.

²⁷ Jasser Auda, *Membumikan Hukum Islam Melalui Maqashid Syari'ah*, 37.

²⁸ *Ibid.*, 11.

²⁹ Abū Ishāq āsy-Syatibi, *Al-Muwāfaqāt fi Uṣūl asy-Syari'ah* (Kairo: Mustafā Muhammad, t.t.), 5.

³⁰ Asafri Jaya Bakri, *Konsep Maqasid Syariah Menurut As-Syatibi*, 70.

The provisions of positive Indonesian law where is being in KUHP, something is regarded that have defiled a reputation, other people. In contrast, something deliberated and purposed to attack respecting or reputation of a person to know all of humanity. KUHP has clearly explained the vilification of reputation, a complaint offense corresponding in Article 310 Paragraph (1) until Paragraph (3). The criminal event of humiliation was deed insulting that dropped position, dignity, and reputation because of accused several things. An act of humiliation is threatened imprisonment the longest nine months and, or fine at most four thousand five hundred's rupiah.

Based on provisions Article 183, The Criminal Procedure Code (KUHAP) explained that judge could not impose a criminal for someone except for at least two of evidence legally.³¹ The referring for Article 183 KUHAP this, to attest criminal action accused adultery (*qadzaf*) have to be having evidence legally based on article 184 KUHAP that is witness information³², expert explanation³³, document³⁴, hint³⁵ and defendant information³⁶.

First, witness information becomes an essential instrument of evidence in criminal cases, and almost all evidence criminal cases are always standardized for examination of witness statements. The criteria of evidence tool is statement witness having provisions that witness must be followed by oath, if only witness reject to take an oath without valid reasons, so he will be exposed to witnesses during fourteen days where it is provisioned in Article 161 KUHAP. Statement witness must be given the opportunity on trial because if the witness gives information outside the trial, he is not be considered by evidence tool to prove defendant error.³⁷

³¹ Look at Article 183 The Criminal Procedure Code (KUHAP).

³² Witness testimony as evidence is what the witness stated at trial, for further see Article 185 Paragraph (1) The Criminal Code (KUHP).

³³ Expert statement is what an expert states in a court session, further see Article 186 The Criminal Procedure Code (KUHAP).

³⁴ Letter evidence as referred to in Article 184 Paragraph (1) letter c is made on an oath of office or strengthened by an oath are:

- a. Minutes and other letters in official form prepared by the authorized public official or before him, which contain information about the events or conditions he has heard, seen or experienced, accompanied by clear and emphatic reasons for the statement.
- b. Letters made according to the provisions of statutory regulations or letters made by an official regarding matters included in the management which are their responsibility and are intended to prove a situation.
- c. A statement letter from an expert that contains an opinion based on his expertise regarding a matter or situation which is formally requested thereof.

Another letter that can only be valid if it has something to do with the contents of other means of proof. For further information, see Article 187 points a, b, c, and d The Criminal Procedure Code (KUHAP).

³⁵ Guidance evidence is an act, event or situation which because of its compatibility, either between one another or with the criminal act itself, indicates that a criminal act has occurred and who the perpetrator is. Guidance can only be obtained from witness statements, letters and statements of defendants. Further, see Article 188 Paragraph (1) and (2) The Criminal Procedure Code (KUHAP).

³⁶ The defendant's statement is what the defendant states at trial about an act he has committed or which he knows or experienced himself. Further, see Article 189 Paragraph (1) to Paragraph (4) The Criminal Procedure Code (KUHAP).

³⁷ Tim Penerbit Citra Umbara, *KUHP dan KUHAP*, ed. X, (Bandung: Citra Umbara, 2013), 241.

Mukti Arto, his book about the Practice of Civil Cases at the Religious Courts, states that a witness gives testimony before a trial by fulfilling certain conditions regarding an event or condition that he has seen, heard, and experienced as evidence of the incident.³⁸ Witness gave the information has to be the case about events or incidents that he has personally experienced. At the same time, the opinion or allegation obtained by reasoning does not constitute testimony.³⁹

Generally, everyone can be a witness, but notable exceptions make them unable to testify. Unless stipulated otherwise in this law, the statement cannot be heard and may resign as a witness. This is as stated in Article 168 point (1), (2), and (3) of the Criminal Procedure Code. Furthermore, article 171 points (1) and (2) KUHAP also adds an exception to give testimony under oath.

Andi Hamzah said that children are not yet fifteen years old, such as people with mental illness, insane illness. However, sometimes, in mental science, it has called by a psychopath. They cannot be fully accounted for in criminal law, so they do not need oaths or promises to be taken in giving information. Therefore, their testimony is only used as a guide.⁴⁰ People can be exempted from their obligation to testify because of their work, dignity, or position. Article 170 point (1) and (2) of Criminal Procedure Code reads as he has been explained above, the witness testimony that was stated before the court regarding what he saw, he felt, he experienced, he was information as evidence (article 185 paragraph 1), how about the witness testimony obtained from a third party. For example, a third party told a story. Matter to the witness that a murder had occurred. Such testimony is called testimonial *de auditu*.⁴¹

Following an explanation of the Criminal Procedure Code, which states *de auditu testimony* is not permitted as evidence. In tune with the purpose of criminal procedure law, which seeks material truth and protects human rights where the truth of the testimony of a witness, who only hears from another person, is not guaranteed, *de auditu* testimony or hearsay evidence should not be used in Indonesia either. However, the audition's testimony also needed to be heard by a judge. Although it does not have value as testimony evidence, it can strengthen the judge's conviction based on two other pieces of evidence.⁴²

Second, the expert explanation as evidence tool according to M. Yahya Harahap in his book about *Discussion of Problems and Implementation of Criminal Procedure Code: Investigators and Prosecution*, only gets with doing to search and

³⁸ Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama*, ed. III, (Yogyakarta: Pustaka Pelajar, 2000), 165.

³⁹ Sudikno Merto Kusumo, *Hukum Acara Perdata Indonesia* (Liberty: PT Ilmu Persada, 1999), 135.

⁴⁰ Andi Hamzah, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2008), 258-259.

⁴¹ *Ibid.*, 300.

⁴² *Ibid.*, 242.

connect from some of the provisions in article KUHAP, starting from Article 1 Paragraph (28), Article 133, and Article 179 by way of setting some of the articles to explain clearly about meaning expert as evidence tool.⁴³ According to Article 184 paragraph (1) of the Criminal Procedure Code, an expert statement is also valid evidence. Regarding the meaning of witness testimony, it can be seen in Article 184 of the Criminal Procedure Code, which states that expert testimony is what an expert states in court. The article does not explain who is an expert and what is an expert's statement. Andi Hamzah explained that expertise is knowledge whom someone has learned (owned). HIR's understanding of science was expanded to include Criminalism, so van Bemmelen said that writing, weapons, fingerprints, and so on were included in the understanding of science.⁴⁴

Third, the evidence tool of the document, according to me. Rubini and Chaidir Ali in Taufiqul Hulam in his book about *Reactualization of DNA Test Evidence from the Perspective of Islamic Law and Positive Law*, explain that evidence tool of the document is anything an object such as paper, wood, leaf, and other of one kind that contains signs reading, it can be read and statement of main idea (embodied in a letter).⁴⁵ In the Criminal Procedure Code (KUHAP), the evidence tool of a document has been arranged in Article 187.

Fourth, the evidence tool of hint is evidence tool indirect because of a judge taking on conclusions about evidence that have to connect anything evidence tool by other evidence tool and chose something being correlated one by others. Evidence tool of hint has to be in Article 188 Criminal Procedure Code (KUHAP). *Fifth*, defendant information has to be arranged in Article 189 point (1), (2), (3), and (4) of the Criminal Procedure Code (KUHAP).⁴⁶

When compared with HIR, there is an addition of evidence, namely expert testimony. In addition, there was a change in the name of the evidence, namely "confession of the defendant" to "testimony of the defendant," because the defendant's testimony was only binding on himself and was no evidence that had perfect and decisive power proof.⁴⁷ The proof is a way to show the clarity of a criminal case to a judge so that problem experienced by the victim is prosecuted legally. Proof is a procedure that must be followed because it is essential in implementing material law. In the trial, the victim and his attorney will bring up incidents that can be used as a basis for strengthening the judge's conviction to ensnare the defendant. However, it is not enough to state it, either in writing or

⁴³ M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan* (Jakarta: Sinar Grafika, 2002), 297-302.

⁴⁴ Andi Hamzah, *Asas-Asas Hukum Pidana*, 268.

⁴⁵ Taufiqul Hulam, *Reaktualisasi Alat Bukti Tes DNA Perspektif Hukum Islam dan Hukum Positif* (Yogyakarta: UII Press, 2002), 63.

⁴⁶ Look at Article 189 The Criminal Procedure Code (KUHAP).

⁴⁷ Andi Hamzah, *Hukum Acara Pidana Indonesia*, ed. II, (Jakarta: Sinar Grafika offset, 2008), 10.

orally. However, it must be accompanied by legally valid evidence to ascertain its correctness, meaning that these incidents must be accompanied by legal evidence. Evidence is the presentation of legal evidence to a judge examining a criminal case to provide certainty about the truth of the events presented and provide deterrents for the accused.⁴⁸

According to Yahya Harahap, only evidence tool reaches limiting of minimum having to value the power of proof for proving preached error. Suppose the evidence tool cannot reach at least two of the evidence tools legally in KUHAP. In that case, the offense automatically puts aside a standard beyond a reasonable doubt (applying a standard of proving legally and convincing), and the fallen punishment can be considered arbitrary.⁴⁹

The legal meaning of proof is a series of disciplinary rules that judges must guide in the trial process to make decisions for justice seekers. Munir Fuadi defines the law of evidence as a process in civil procedural law, criminal procedural law, and other procedural law, using procedures for the judge's authority to assess facts or statements disputed in court to prove the truth.⁵⁰

Eddy Hiariej, in his book *Theory and Law of Evidence*, explained that evidence provisions to contain hatching and guidance about step by step what be justified by the enactment in proving error indicted for the defendant. The evidence also regulated evidence tool that is being justified by enactment and then applied by a judge to prove error as a defendant.⁵¹ Adami Chazawi said that the activation process of evidence could be differentiated to become two of something, is part of fact disclosure and part of employment fact analyzing plus analyzed law.⁵²

Penggaben explains that theoretically is being four of theory about the evidence system. *First*, evidence system according enactment positively (*positief wettelijke bewijs theorie*). The theory stated that a positive evidence system depends on an evidence tool called a limitation in enactment. In enactments, it had been determined about being evidence tool used by the judge in process trial how judge applied it as the power of evidence tool and how judge have to decide for proving or not, the case has been on trial. So that, if only the evidence tool is used corresponding with enactment, the judge must determine the defendant be false although the judge believed that defendant is not false.⁵³

Second, the evidence system according to judge conviction (*conviction intime*), the evidence system based on judge conviction the meaning judge can impose

⁴⁸ Wahyu Muljono, *Teori dan Praktik Peradilan Perdata di Indonesia* (Yogyakarta: Pustaka Yustisia, 1995), 105.

⁴⁹ Eddy Hiariej, *Teori dan Hukum Pembuktian* (Jakarta: Erlangga, 2012), 4.

⁵⁰ Munir Fuadi, *Teori Pembuktian Pidana dan Perdata* (Bandung: PT. Citra Aditya Bakti, 2006), 1.

⁵¹ Eddy Hiariej, *Teori dan Hukum Pembuktian*, 2.

⁵² *Ibid.*

⁵³ Panggabean, *Hukum Pembuktian* (Bandung: PT Alumni, 2012), 81.

decision based on the confidence of judge who does not be fastened by something of regulations. The system "Conviction Intime" can be a false defendant depending on the judge's confidence. As a judge is not fastened for regulation, the judge's decision can be felt subjectively.⁵⁴

Third, the evidence system is based on the judge's confidence in reason that is so logical (*Laconviction Raisonnee*). A theory explains that a judge can decide someone to be false based on the judge's confidence, evidence, or verification, and a conclusion (*conclusie*) that refers to some of the regulation evidence particular.⁵⁵ *Fourth*, evidence is according to enactment negatively (*negatief wettelijke bewijs theorie*). Evidence system, according to enactment, negatively determine it that judge only allowed to fall criminal for the defendant. At the same time, the evidence tool was determined by the enactment in a limitation and supported by being the confidant of judge forward existing it is evidence tools.⁵⁶

In criminal procedural law, the proof is a central point in case examination in court. Through the evidence stage, which is a process, method, act of proof, shows whether the defendant is right or wrong in a criminal case in a court session. Evidence is provisions that contain outlines and guidelines on ways that are justified by law to prove the guilt of the accused to the accused. Evidence is also a provision regulating evidence justified by law which a judge may use to prove the accused's guilt.⁵⁷

PUNISHMENT OF CRIMINAL ACT ACCUSED ADULTERY (QADZAF) IN INDONESIAN POSITIVE LAW PERSPECTIVE OF MAQĀSHID AL-SHARIA

Based on the punishment that is applied for the perpetrator of a criminal act accused of adultery (*qadzaf*) in positive Indonesian law, it can be analyzed in using the perspective of *maqāshid al-Sharia* because *maqāshid al-Sharia* is to study about intent and purpose in prescribing of law because sharia had purposed to the benefit of human being in world and hereafter (the afterlife). The benefit is through analyzing *maqāshid al-Sharia*, and it is not only seen the meaning of technically but also in effort dynamics and development of law seen as something contains philosophical values from a law that was being declared by Allah toward human being in this world. *Maqāshid al-Sharia* means the purpose and secret of Allah in placing sharia. That goal is *maṣlahah* for all people.⁵⁸

⁵⁴ *Ibid.*, 82.

⁵⁵ *Ibid.*, 83

⁵⁶ *Ibid.*

⁵⁷ Eddy Hiariej, *Teori dan Hukum Pembuktian*, 2.

⁵⁸ Khairunnisak, dkk., "Penerapan Konsep Jera Hukuman Ta'zir dalam Presfektif Maqashid Syariah (Studi Kasus Penegakan Hukum Pada Masa Syekh Abdul Wahab Rokan Di Babussalam)", *Jurnal AT-TAFAHUM: Journal of Islamic Law* 2, no.1 (January-June 2018): 5, <http://jurnal.uinsu.ac.id/index.php/attafahum/article/download/5113/2354>

The accused adultery (*qadzaf*) is prohibited by sharia because accused other people to do adultery can be affected toward reputation or accused tarnishing of reputation. In setting to apply protection toward respects of human, positive Indonesian law where is arranged in Criminal Code (KUHP) and Criminal Procedure Code (KUHAP) arranged about punishment as the perpetrator of criminal act accused adultery (*qadzaf*) that is categorized as insult such as being inside Article 310 KUHP explain that perpetrator is threatened imprisonment the longest nine months and fine most widely four thousand five hundred rupiahs.

Based on punishment which is enforced for a perpetrator of criminal action accused of adultery (*qadzaf*) in positive Indonesian law, therefor writer will analyze with using *maqāṣid al-sharia* as perspective and get some of the points important about applying punishment for the perpetrator of criminal action accused adultery (*qadzaf*) that is following:

First, protect religion (*hifz ad-din*). Religion is needed absolute for a human being, wherefore to getting prima priority to keep sustainability and safety. Islamic shari'a was revealed in order to maintain *maqāṣid al-khamsah/kulliyatul khamsah*. Religion is the most critical level of the *maqāṣid*, because religion is its spirit, while others are just its branches. Branches will not be able to exist except by preserving religion.⁵⁹ Provisions of punishment criminal act accused adultery (*qadzaf*) in positive Indonesian law such as punishment the longest nine-month and or fine most widely four thousand five hundred rupiahs with the principle of protecting toward religion. *Qadzaf* or slander occurs when someone falsely accuses a Muslim of adultery or doubts his lineage. It is a significant crime in Islam, and the perpetrator is called a sinful offender.⁶⁰ Islam forbade deeds accused of adultery (*qadzaf*) because accused adultery is a forbidden deed and one of big sin. Therefore, punishment of imprisonment or fine enforced for perpetrator accused of adultery (*qadzaf*) is expected to give the perpetrator awareness of not doing a deed which is forbidden according to shara' provisions.

Second, protection of soul (*hifz an-nafs*). Caring for offspring preserves human sustainability and fosters a mental generation to create a sense of friendship and unity between humans. A well-regulated marriage institution is needed to achieve this goal and prevent acts that can damage both self and offspring.⁶¹ Safety of the soul is a basic human need, so humans must maintain the continuity of life. All of anything that is considered a means of saving souls is obligatory. The provisions of punishment for the perpetrator accusing adultery (*qadzaf*) in

⁵⁹ Ismardi Ilyas, "Stratifikasi Maqashid Al-Syari'ah Terhadap Kemaslahatan dan Penerapannya", *Jurnal Hukum Islam* 15, no. 1 (Juni 2014): 17, <http://ejournal.uin-suska.ac.id/index.php/hukumislam/article/viewFile/985/919>

⁶⁰ Anwar Haryono, *Hukum Islam Keluasan dan Keadilan* (Jakarta: Bulan Bintang, 1965), 18.

⁶¹ Muhammad Abu Zahrah, *Ushul al-Fiqh* (Damaskus: Dar Fikr al-'Araby, tt), 367.

the form of a maximum imprisonment of nine months and/or a maximum fine of four thousand five hundred rupiahs following the principle of protection of life. This is occurring because accusing adultery can be caused pain toward the accused through the accuser's words.

Third, protection of mind (*hifz al-'aql*). Maintaining reason means keeping the mind from being damaged, which results in *mukallaf* being useless in society, even becoming a source of calamity/problems.⁶² Protection toward the mind is obligatory because using the mind, and the human can do all of the function them as *khalifah* in the world. In mind, humans can differentiate between good and evil. The mind can think universally naturally around them. Allah SWT instructs protection and recommends using reason to gain knowledge. In order to protect it, Allah forbids anything that can corrupt or weaken reason. Punishment will be obtained for those who eat something or do something that can make sense of losing mind by human.⁶³ Punishment for perpetrator accused of adultery (*qadzaf*) is imprisonment the longest nine-month and or fine most widely four thousand five hundred rupiahs aim at the protection of mind for the perpetrator in order to awareness deed him because of affected person that is accused of doing adultery becomes the sick heart and defiled reputation him.

Fourth, protection of property (*hifz al-māl*), property, and other treasures are needed by a human being to support life sustainability in the world. In searching and managing property, Islam learns ways good and the best to protect property and function. Punishment for a perpetrator accused of adultery (*qadzaf*) is imprisonment for the longest nine months and or fine most widely four thousand five hundred rupiahs based on the principle of protected property. That can be seen from punishment compensation for the victim of crime qua alternative form of punishment because reputation is defiled to effect deed accuser.

Fifth, protection of respect (*hifz al-'ird*), *qadzaf* is the determination that is done by the person the other person for perpetrator adultery or termination of the lineage of a Moslem. Allah forbids this act to maintain human honor. Mainly, adultery is directed at a good person and has a noble position in society.⁶⁴ Hence, the accusation of adultery is not proven, considering he is very dangerous for people's lives. Islamic criminal law provides a legal basis for the convicted party referring to the Koran, which stipulates that replying for an evil act must be

⁶² Abdul Wahhab Khallaf, *Ilm Ushul al- Fiqh* (Kuait: Dar al-Qalam, 1978), 201, see also Muhammad Abu Zahrah, *Ushul al- Fiqh* (Damaskus: Dar Fikr al-'Araby, tt), 367.

⁶³ Afridawati, "Stratifikasi Al-Maqashid Al-Khamsah (Agama, Jiwa, Akal, Keturunan dan Harta) dan Penerapannya dalam Masalahah", *Jurnal Al-Qishthu* 13, no. 1 (2015): 21, <http://jurnal.fs.iainkerinci.ac.id/index.php/alqisthu/article/viewFile/9/2>

⁶⁴ Hamzah Hasan, *Kejahatan Kesusilaan Perspektif Hukum Pidana Islam* (Makasar: Alauddin University Press, 2012), 153, see also Hamzah, "Kategori Tindak Pidana Hudud dalam Hukum Pidana Islam", *Jurnal Al-Daulah* 4, no. 1 (Juni 2015): 68, http://103.55.216.56/index.php/al_daulah/article/download/1502/1442

proportional to the act. Islam includes defamation as a crime related to public relations, which harms the rights of individuals and society and has a profound impact because Islamic law strictly safeguards the honor of every human being.⁶⁵ In addition, to stipulate hudud punishment in the form of punishment of 80 times for *qadzaf* perpetrators, Islamic law also stipulates worldly punishment in the form of *ta'zir* punishment in which the implementation of the law is submitted to the ruler or judge or those who have judicial power (the judiciary). According to the author, punishment for a perpetrator accusing adultery (*qadzaf*) contained in Indonesia's positive law (KUHP) in the form of a maximum imprisonment of nine months and or a maximum fine of four thousand and five hundred rupiahs is a form of *ta'zir* punishment and aims to protect honor someone. This is happening because an act of correlation toward the act of adultery against someone who can cause the accused person to have his reputation tarnished, so that accuser, the meaning of the accused person, must receive punishment in order to rehabilitate good name of the person who has been accused and to clean his reputation.

Accused adultery is an action that hurts the victim so much because of the emergence of wound non-physical by the victim. Therefore, appropriately, the perpetrator accused of adultery has been given punishment as a form of learning to prevent the perpetrator from repeating the action and being aware that the action is not allowed by religion or correct according to any religion. Associated with the five main elements above, the aspect of *daruriat* that is related to punishment for perpetrator accused of adultery (*qadzaf*) is an aspect of protection for respect (*hifz al-'ird*)—that aspect related to respecting each person that has to be protected. If the perpetrator is accused of adultery (*qadzaf*) is not threatened with punishment strictly.

Based on the analysis that writer has done, the fundamental value from enforcement punishment criminal act accused adultery (*qadzaf*) such as imprisonment the longest nine-month and or fine most widely four thousand five hundred rupiahs in positive Indonesian law, it is the step of preventive that is applied to prevent in order to each person is not easy to do blasphemy deed adultery for other person and attack respecting another person because of effecting vilification of reputation. In addition, the fundamental value in punishment criminal act accused adultery (*qadzaf*) is to appear effect to give up for perpetrator. At the same time, instrument value and fundamental achieve, so the destination of maqāsid al-Sharia which is made it will also achieve it. On the other hand, being punishment for perpetrators accused of adultery (*qadzaf*) does expect to be able to create aims of sharia and guidance in Islam law especially such as preventive and guidance can be achieved to appear effect giving up than perpetrator will not repeat on deed him.

⁶⁵ Abdul Halim Barkatullah, *Pidana Hukum Islam* (Bandung: Citra Aditya, 2003), 7.

This must be admitted that Indonesia's positive law as contained in Criminal Code still has many weaknesses. When comparing Islamic criminal law and Indonesian criminal law (positive law/KUHP), several applicable criminal threats are very different in imposing criminal punishment on criminals. Criminal law that comes from the Criminal Code, all criminal acts are almost subject to imprisonment (eliminating one's freedom), so that the punishment given to a criminal who is only limited to taking away freedom of perpetrator who is deemed unfair and does not adequately treat pain/loss felt by victim or victim's family. This is different from the provisions in Islamic criminal law, which regulates; all punishments based on the level of crime that occurred. Islam also recognizes an act to erase sins and be accountable for their actions. Thus any retaliation and a sense of justice that is aspired to be created automatically and deterrent effect will also be felt by the perpetrator of the crime and people who see the punishment, and they will feel afraid to commit crimes as the perpetrators have done them.⁶⁶ Through the legislative body, the state needs to restructure the Criminal Code into a better law to create a good law within a country, especially to eradicate crimes that were already very disturbing. With the *hudud* crimes and punishment, the public interest of Muslim society is being protected. In addition, these crimes are known as *hudud* because Allah has conclusively and permanently specified their severe punishments.⁶⁷

CONCLUSION

According to positive law in Indonesia, accusing adultery is categorized as an insult as contained in Article 310 of the Criminal Code, which threatens the perpetrator with a maximum imprisonment of nine months and/or a maximum fine of four thousand and five hundred rupiahs. A person is considered to have defamed someone else while someone did deliberately and aims to attack someone's honor or reputation so that other people will know them. Criminal Code has clearly described defamation as a complaint offense as stated in Article 310 paragraph (1) to paragraph (3). A criminal event, which constitutes an insult, is an act of slander that reduces a person's position, dignity, and good name by accusing something, the meaning it has known by the public. This offensive act is punishable by a maximum imprisonment of nine months and/or a maximum fine of four thousand and five hundred rupiahs.

An aspect of *ḍarūriyyāt*, concerning punishment for the perpetrator who accuses adultery (*qadzaf*), is an aspect of protection of honor (*hifz al-'ird*).

⁶⁶ Safaruddin Harefa, "Penegakan Hukum Terhadap Tindak Pidana di Indonesia Melalui Hukum Pidana Positif dan Hukum Pidana Islam", *Jurnal UBELAJ* 4, no. 1 (April 2019): 55

⁶⁷ Wahbah Az-Zuhaili, *Fiqh Islam wa adillatuhu*, Vol. VI, (Damaskus: Daar Fikr, 1989), 81.

This aspect relates to the honor of each person that must be protected. While perpetrator accusing adultery (*qadzaf*) is not threatened with strict sanctions, of course, perpetrators can repeat their actions so that they will threaten the honor of others. The fundamental value of imposition of criminal sanctions accusing adultery (*qadzaf*) in positive Indonesian law is a preventive step taken to prevent each person is not easy to tend toward deed adultery for other's and attacking the honor of other's because it can cause the accused person to have his reputation tarnished him. Meanwhile, the instrumental value in criminal punishment of accusing adultery (*qadzaf*) is to deter the perpetrator.

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