

THE URGENCY OF SOCIO-LEGISLATION IN PROVIDING LEGAL RESPONSIBILITIES OF MARITAL CHEATING

AH Fajruddin Fatwa

UIN Sunan Ampel Surabaya | Jl. A. Yani No. 117 Surabaya |
andifajruddinfatwa@gmail.com

Abstract: The desire to accommodate marital cheating as a despicable act and against the law has not been properly accommodated in the law enforcement process, even though this has long been developing and has many victims in society. Offenders are often only considered despicable acts specific to the parties involved with the victim, limited to the scope of the household. In fact, according to the results of the study conducted in the writing of this paper, various legal responsibilities of actors have been well accommodated in Indonesian social norms, and possible to arrest actors from the perspective of legislation. Therefore, the study of actors cannot be reduced to only those that limit themselves to written legal provisions by using the paradigm of the legality aspect of legal sources in determining crimes and acts against the law alone. This paper proves that marital cheating is not just a despicable act prohibited by social norms but also shows the various court judgments that have been made in resolving the marital cheating dispute.

Keywords: Marital Cheating, Legal Responsibility, Despicable Act, Social Norms, Socio-Legislation.

Introduction

The study of actors is not an easy thing to do. The word “women cheating” or *pelakor* (*perebut laki orang*) is usually understood simply as a short acronym for seizing someone’s husband. *Pelakor* is not an official word found in the Big Indonesian Dictionary. Society uses this word as a designation for a woman who is considered a destroyer of a legal marriage relationship. The opposite also happens to the term “men

cheating” or *pebinor* (*perebut bini orang*) which is the name of a man who takes someone’s wife.

The use of “cheating” actually has various problems. From an academic perspective, this word certainly has three perspective biases at once. First, gender bias, the word cheating is aimed at women who take someone’s husband. Women are considered the dominant legal subject in this act. Men may be the ones who play a role in the breakdown of marriages.

Second, the implications of pragmatic bias of women cheating and men cheating bring up the conceptual biases about how the motives and *modus operandi* used by actors in carrying out their actions. This problem is important to determine the ideal benchmark that his actions are legally justified or not included in unlawful acts. Some parties simply say that women cheating and men cheating are not illegal acts. The simple reason used is that no chapter explains that women cheating and men cheating are acts against the law. This reason is commonly referred to as part of the reason for the principle of legality in the criminal law perspective.¹

In a court judgment, someone who has committed adultery uses the alibi to dispute the legal position of the cheat. The actor of adultery tells their victims that cheating is not against the provisions of the law and does not even have a rule of law. The person who is supposed to uphold the moral norm seduces the victim by saying that “there is no law in cheating, if anything happens, the defendant will be held responsible, so the witness asks to be held accountable”.² The evidentiary process shows that there was adultery that occurred between the defendant and the witness. However, the actor’s witnesses were not prosecuted in the examination process. Likewise, the defendant’s husband accepts the court’s judgment and releases witnesses who are legally and convincingly proven to have committed adultery.

¹ Read the concept of principal legality in Teguh Prasetyo, *Hukum Pidana* (Jakarta: Rajawali Grafindo, 2015), 37-39.

² Check the statement of the person in decision number; 139/Pid.B/2017 PN.PTK.

It is possible for the women cheating and men cheating to escape from legal snares by repealing police reports. The actor's legal spouses are sometimes embarrassed to continue the case, respect privacy, and provide opportunities for repentance to their spouse. The report was repealed and could not be continued because the adultery included a total adultery offense. A regent in Kalimantan reported that the case of adultery was not followed up by the complainant because the husband and wife did not continue the legal process. Surprisingly, the regent was impeached from his position with the MA judgment that the regent was impeached for "allegations of a despicable act, violating ethics, the Laws and Regulations carried out by the Katingan Regent, based on the law".³

Similar reasons were conveyed when reviewing the women cheating and men cheating from a civil law perspective. The basic principle of civil law stipulates that unlawful acts are measured by the existence of losses that befall other parties which are considered unable to reach the concepts of women cheating and men cheating. The formulation of Chapter 1365 of the Civil Code (*KUHPerdata*) said, "Every act that breaches the law and causes harm to others, obliges the person who caused the loss because of his mistake to replace the loss." The actions of the women cheating and men cheating have not been considered as acts of harming others because the proof of harm is not carried out in the judicial process.

Third, the problem of bias in the structure of Indonesian grammar. Indonesian does not have the form of grammatical markers of masculine or feminine characteristics of a word. Therefore, the use of the words *pelakor* (the women cheating) and *pebinor* (the men cheating) may be used as inseparable concepts. In this study, the word *pelakor* is considered as a word that represents *pebinor*. The use of the word *pebinor* is only carried out if in the

³<https://www.liputan6.com/news/read/2905333/ma-kabulkan-usul-pemberhentian-bupati-katingan-karena-kasus-zina> accessed on 12th February 2021.

research process, it is found that a man is considered seizing someone's wife.

If it is associated with the scope of legal science, the use of this word can be considered a non-legal word. Therefore, some people carelessly assume that marital cheating has no direct or indirect connection with unlawful acts in civil law, the term crime in criminal law, as well as breaches of contract agreements between the parties who commit them.

The various problems above are more interesting if further research is carried out that examines the legal actions of marital cheating and their legal status. Therefore, from the beginning, the research design used to answer the above questions was realized in the form of dogmatic juridical research. Various social facts that are used to support the explanation of the object of research will still be studied using legal arguments.⁴ Data collection was carried out using the documentary method by studying various legal rules related to the primary research issues and then analyzed using prescriptive techniques to explain the gaps in law enforcement on actors. This study uses a variety of approaches that are considered capable of answering the main research issues, namely the statute approach, the historical approach, the conceptual approach, and the case approach. The primary legal materials used are from the Civil Code (*Burgerlijk Wetboek*, *Staatsblad* 1847 No. 23), the Criminal Code (*Wetboek van Strafrecht*, *Staatsblad* 1915 No. 732), and various other secondary sources that indicate risks the law that must be faced by the actor.⁵

Victims of Marital Cheating and Social Pathology of Indonesian Society

The study model of actors in the legal system in Indonesia often has not received a proper legal analysis. Various social phenomena involving actors are considered as social phenomena

⁴ Philipus M. Hadjon, and Tatiek Sri Dajtmati, *Argumentasi Hukum* (Jogjakarta: Gajah Mada Univ.Pres, 2005), 28-39.

⁵ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Mulia, 2015), 133-177.

and have not yet touched on serious legal phenomena. Several independent studies contained in journal writings and final studies also often identify marital cheating as an act of adultery. Other studies show that marital cheating is only considered as part of the failure of the household due to the presence of other people in the marriage. This failure is considered a personal problem for couples who breach marital fidelity. Various households from all circles broken because of marital cheating

The last phenomenon discussed in society was much news about a regional political figure having the courage to apologize in front of the public. This happened after the legal wife who tried to stop her husband's car, which was suspected of having marital cheating, was "dragged" by the husband's car.⁶ Previously, it was rumored that a husband who had high education and had a respectable position in society had to deal with the police for asking his wife to cut off her finger as proof of loyalty.⁷

A man in Pengkol-Ponorogo is a migrant worker from South Korea. He asked a bulldozer operator to demolish his house because his wife cheated on him. The mediation carried out by Sunoto, the local village head, community leaders, and law enforcement officers was not able to stop a rented bulldozer from destroying his house.⁸ Instead, the wife and the men cheating got married, had children, and did not receive any legal consequences for their actions. The marriage law considers that the assets obtained during the marriage are common property.⁹ Likewise, officials who fail to reconcile migrant workers who want to destroy their homes seem resigned and "approved" to the act of destruction committed by one of the parties with the reason that

⁶ "Viral di Medsos Karena Kasus Istri Terseret Mobil, Wakil Ketua DPRD Sulut James Arthur Minta Maaf" <https://www.youtube.com/watch?v=TWQeHkVN-so> Kompas TV, 08th February 2021.

⁷ <https://www.antaranews.com/berita/42343/kasus-potong-jari-istri-oknum-dprd-ke-pengadilan> accessed on 08th February 2021.

⁸ "Heboh! Kesal Diselingkuhi Istri, Seorang Warga di Ponorogo Robohkan Rumah Sendiri" | tvOne, accessed from <https://www.youtube.com/watch?v=HxgXZr6bIP0> on 08th February 2021.

⁹ Law Number 1, 1974 about Marriage Chapter 35 (1).

the agreement of the parties and the destroying are a part of the complaint offense that requires a report.¹⁰

Various examples of these social phenomena show that marital cheating occurs in three serious legal problems. First, marital cheating triggers arbitrary action (*eigenrichting*). Second, the actor of marital cheating is free from legal responsibility. The spouse is responsible for marital cheating action. Third, marital cheating has spread widely in society. Marital cheating is not the only legal problem owned by the elite, rich, honorable, and educated but also a potential daily problem in society.

The three main reasons for this research are public uncertainty in responding to marital cheating actions, the perception of some people towards actors who are free to carry out their actions, and the lack of legal studies that use actors as objects of study. Researchers are trying to conduct a study of the various legal responsibilities of an actor contained in regulations in Indonesia and legal remedies that can be taken by the society to resolve the actor's problems. This research not only explores the prescriptive aspects of marital cheating actions but also offers the right concept of legal protection to be applied in the context of prosecuting an offender before the court.

Marital Cheating in Indonesian Social Norms

The study of marital cheating in marriage has interesting. Marriage is considered the smallest structure of social life. The dynamics of marital problems are slowly becoming a serious debate. Some people think that marriage is a legal relationship that regulates private matters that occur between a couple or a couple's family. Therefore, the intervention of other parties is not allowed. A social norm that has long been known to the public states that "*ojok ngurus omahe liyan*" (do not interfere with other households).

The assumption that marriage is limited to spouses and families is inverse to the concept of marital cheating in the past.

¹⁰ Law Number 1, 1946 about Criminal Code Chapter 406 (1).

Indonesian social norms put marital cheating as a public crime that must be fought together. Most Indonesian people have assumed that marital cheating is a crime. The Malay and Javanese people refer to the act of marital cheating as “*perusak pagar ayu*”, the Madurese calls it *agigir ate*’ (broken heart), and the Bugis call this act as *siri’ ripakasiri*’. For the Bugis society, the act of marital cheating is very degrading to the family’s dignity.

The conception of marital cheating has lived, developed, and believe to be a customary norm that is obedient by the majority of Indonesian people. This act has been regulated in customary and religious ethical norms. Javanese society has long assumed that marital cheating is a despicable act. Sutoyo mentions a Javanese philosophy that prohibits marital cheating “*Sing sapa seneng ngerusak katentremaning liyan bakal dibendu dining Pangeran lan dielehake deneng tumindake dhewe*” (Who destroys other’s household will be hated by God and get the law of karma). Javanese people, from elite social to commoners, have the same prohibition against destroying the peace of other households. Who does the marital cheating will get the wrath of God and allegations for his actions.¹¹ The norm of destroying other marriages is something accepted by all societies.

One of the chronicles of Javanese history known as the “*serat pararaton*” contains two exciting stories about marital cheating. The first story is about an actor named Bhatara Brahma who had sex with Ken Endok’s wife. Bhatara Brahma also forbade the victim to have sex with her legal husband by saying, “*Djanganlah engkau bersetubuh dengan suamimu lagi, djika engkau bersetubuh dengan suamimu, suamimu meninggal, karena kejampuran dengan anakku*” (Do not have sex with your husband again, if you have sex with your husband, your husband dies, because of abuse with my son).¹² The second story tells about how Ken Angrok’s interest in his boss’s

¹¹ Sutoyo, “Integrasi Tasawwuf Dalam Tradisi Kejawaen Persaudaraan Setia Hati Terate”, dalam *Jurnal Teosofi: Jurnal Tasawwuf dan Pemikiran Islam*, Vol. 4, No. 2, December 2014, 341.

¹² R. Pitono Hardjowarno, *Pararaton* (Malang: Brathara, 1962), 12.

wife and sparked the courage to commit premeditated murder to have his boss's wife.¹³ Finally, Ken Angrok was killed by Tunggul Ametung's son.

The story above has a bad impact on a marriage. Marital cheating not only seizes a wife but also dares to commit murder. Brahma killed Ken Endok's husband, while Ken Angrok killed Tunggul Ametung. It is not only households that can be destroyed by actors, the legal spouse is also killed.

Apart from the Javanese, the Madurese have a more assertive opinion. Marital cheating is a crime that has the potential for death. Victims are allowed to give strict punishment. The Madurese thinks that *pelakor* is a potential act that allows someone to have the courage and an acceptable reason to kill another person. Some Madurese people think that taking someone's wife is a serious crime that cannot be forgiven (*tak bisa ebacco*). If the motives for the disputes contained in other issues can be resolved with various considerations, agreements, and peace, then the dispute resolution of actors tends to be single, namely bloodshed. This crime is not only seen as a matter of loyalty and household, but also as an insult to the value of family honor, and an insult to the existence of the husband (*tada'ajina*).¹⁴

The strength of the Madurese tradition regarding the obligation to protect the family from marital cheating can be seen in Court Decision Number 363/Pid.B/2013/PN.Kraks. The Court Decision explained that a father and son committed the crime for customary motives. Father and son dared to kill the other party because their warning to the actor not to disturb his wife was ignored. The murderer thinks that disturbing his wife is a

¹³ Susanto Yunus Alfian, "Pararaton Sebagai Sumber Sejarah: Pemanfaatannya Dalam Pembelajaran Di Era Digital", in the journal *Pendidikan Sejarah Indonesia*, JPSI, Vol.2, No. 1, 2019, 42-44.

¹⁴ Rokhyanto and Marsuki, "Sikap Masyarakat Madura Terhadap Tradisi Carok: Studi Fenomenologi Nilai-Nilai Budaya Masyarakat Madura" in the journal *el Harakah*, Vol. 17, No. 1, 2015.

despicable act, so committing murder is a maintain the family's dignity.¹⁵

The action of the father and son who killed the men cheating because of disturbing their family was interesting to understand. First, the men cheating actions have not been proven in court. Second, the existence of despicable acts disturbing other people's families still strongly influences people's legal beliefs. Third, the men cheating assume that no institution can solve the problem.

The act of disturbing the household may not be listed in the formal or material offense. The belief in the reality of the act as a despicable act is a social fact that cannot be denied. As a result, people who think the applicable law is not in their favor trigger the courage to violate the rule of law. This violation should be considered as a reaction to the saturation of the society towards the established system that is not on their side.¹⁶

The judgment of *pelakor* as a crime that is recognized by society can be found in the process of resolving the marital cheating disputes in the Ngaju people. Damang, the Ngaju Customary Head, Jekan Raya District, through his judgment Number: 003/DKA-KJR/BA-HPPA/II/2018 concerning the official report of Hatulang Belum and Tungkun's customary cases, succeeded in establishing customary punishments for marital cheating. A wife who sued her husband and a woman who was suspected of being the woman cheating sued in the customary court. Damang, the customary head who became the chairman of the court, then gave a legal judgment that won his wife's lawsuit.¹⁷

The judgment of this punishment has made a positive contribution to the development of customary law. In contrast, there are no customary institutions that channel socio-legislative

¹⁵<https://putusan3.mahkamahagung.go.id/direktori/putusan/1eb1fc6aefff9b92d5768038b8a6d617.html> accessed on 9th February 2020.

¹⁶ Abdul Manan, *Aspek-Aspek Pengubah Hukum* (Jakarta: Prenada Mulia, 2013), 86-88.

¹⁷ Putri Fransiska Purnama Pratiwi (et.all), "Upaya Hukum untuk Menjerat Tindakan Pelakor dalam Perspektif Hukum Adat Dayak Ngaju", in *Jurnal Cakrawala Hukum*, Vol. 10 No. 2, December 2019, 215.

beliefs as happened in Probolinggo. The Ngaju people give legitimacy to the existence of valid customary law. The stipulation of customary punishment provides an alternative solution for resolving disputes in society that take case settlements out of court.

The customary punishment given by Ngaju customary law is not a light sentence. Ngaju gives hard punishment for marital cheating. This punishment is manifested in the form of giving very large fines for marital cheating. customary fines for marital cheating who dare to seize someone's husband or wife, citing Purnama Pratiwi's opinion, are: a) paying twice the value of the man's dowry (*mahar*); b) paying fifteen times the *ramu tekap bau mate* (shame cover) for the family of the woman's legal wife; c) provide *sinde mendeng* clothes (one set of clothes) for women who are legal wives; d) pay compensation for the cost of the wedding party which is issued by the legal wife and family; e) bear the costs of a special customary peace party (eating and drinking together, slaughtering two pigs for nature and the local society).¹⁸

In addition to customary norms believed by the Indonesian people, religious norms also have an important role in social interaction. Religious norms derived from Islamic teachings expressly prohibit the act of marital cheating. Marital cheating is a person who commits a prohibited act and is contrary to religious teachings. Prophet Muhammad SAW. refuse the existence of marital cheating as part of his adherence. Some Muslim people also think that marital cheating is a despicable act.

The legal anatomy of marital cheating in Islamic teachings is interesting to study. If the socio-juridical norms are limited to acts during the marriage, the teachings of Islamic law have distinguished marital cheating in two different forms of rules. The difference in this rule is in the *tempus delictie* when the actor carries out his action. Islamic teachings recognize that marital cheating is distinguished in the period of marital cheating in the pre-wedding period and marital cheating during the ongoing marriage.

¹⁸ Ibid. 216.

First, the pre-marital period means that there is a prohibition on a person to propose to a woman who is in someone's proposal unless the person returns the proposal and cancels the proposal that has been made. Islamic teachings assume that someone who has accepted someone's proposal is prohibited from accepting another proposal just because the last proposal looks better than the first proposal. However, there is no mention of any sanctions that must be accepted when receiving a second proposal. Prophet Muhammad SAW condemns the presence of the second proposal without canceling the first proposal. The Ulema only differ on the mechanism for the legitimacy of the cancellation of the proposal. A woman has the right to cancel the proposal received unilaterally or the cancellation of the proposal must be under the approval of the man who has previously proposed.

Hadiths that explain the prohibition of marital cheating in the proposal process are found in various hadith books. One of the well-known hadiths comes from Abu Hurairah ra., who narrates "do not let a man propose to a woman who has been proposed to someone, so that person gets married or leaves".¹⁹

The simple formulation contained in the above hadith has implications for both parties. First, men are prohibited from proposing to women who have accepted the proposal of other men. Second, women who have received a proposal should not accept the proposal of others men. The implications in the hadith, unfortunately, are only limited to legal ethical guidance which does not have a clear sanction mechanism. The above hadith does not clearly state the legal consequences that arise if the proposal fails due to the presence of marital cheating or the proposal fails because the parties involved see a better opportunity than the first proposal process.

The prohibition of acting on the norms of Islamic law was accommodated into state law in Presidential Instruction No. 1 of 1991 concerning the Dissemination of the Compilation of Islamic

¹⁹ Ahmad Bin Syu'aib Abu Abdir Rahman an-Nasa'i, *Sunān An-Nasā'ī*, Cet II, Juz VI (Aleppo: Maktab al-Madbuat al-Islamiyah, 1986), p. 73.

Law. This prohibition is clearly stated in Chapter 12 chapter 3 which states that there is a prohibition on proposing to a woman who is being proposed by another man, as long as the man's proposal has not been broken or there has been no refusal from the woman. If the proposal is broken, the provisions of the KHI mandate that it be carried out in a good manner following the guidance of local customs and habits, so that harmony and mutual respect are maintained.²⁰

It is no different from the spirit of the prohibition on proposing to women who have been asked by parties in the hadith. The presidential instruction did not mention the legal consequences arising from the failed proposal process. Some parties who fail to carry out the proposal process sometimes only have an obligation to return the physical delivery received. Meanwhile, various material and immaterial losses arising from the failure of the proposal are not considered as legal obligations that need to be replaced.

Second, marital cheating occurs when the wedding is in progress. On one occasion, what is believed to be a source of Islamic law, explained that marital cheating received ethical sanctions by not being recognized as part of the Muslim community. "someone who *takhhbib* against a woman so that she goes against her husband and a slave against his master is not my adherent."²¹

The prohibition to become marital cheating (in the first and second types) implies the same thing. The legal sanctions given to marital cheating are limited to the assumption that the activities include sin and receive ethical sanctions only. The difference in the text content contained in the two hadiths above is the additional ethical sanctions in the hereafter. The actor of

²⁰ President instruction of Republic of Indonesia Number I 1991 about the dissemination of the Compilation of Islamic Law Chapter 12 (3) Jo. Chapter 13 (2).

²¹ Ahmad, Muhammad Hazim (et. all) Proving Takhhbib Criminal Offense In Syariah Court Through Digital Forensic Evidence And Expert Opinion in *Syariah And Law Discourse: Special Series E-Proceeding of the 2nd International Conference of the Postgraduate Students and Academics in Syariah and Law (INPAC) 2019*, 115.

marital cheating will not accept the status of an adherent of the Prophet Muhammad.

Unfortunately, the various legal contents about the prohibition of *takhhbib* do not explain how the legal sanctions must be given to marital cheating. The difficulty of giving legal sanctions using the view of Islamic law is because a man can have more than one wife, and a woman can offer herself to be a second, third, and fourth wife to a man. The offer to become a second wife cannot be related to the form of the operational definition of marital cheating, which is limited to the act of “taking someone’s man”. The second, third, and fourth wives never feel the urge to seize someone’s partner.

In a limited interview with a group of polygamists in WA, they assumed that polygamy was not carried out to steal someone’s husband or possess him. They also never encourage husbands to divorce other wives. The actions are taken starting from the self-introduction process carried out by the first wife.²² Apart from the introductions made by the first wife, and some group participants did not know if the husband already had a wife. When they find out that the husband already has a wife, the first wife’s blessing is a requirement to continue the second marriage. Other people admitted that the first wife’s blessing was given after intensive interaction and explanations were given.

Marital Cheating and Unlawful Acts in the Sociological Perspective of Legislation

Finding the formulation of marital cheating in the positive legal structure of Indonesia is very difficult. This difficulty is suspected by the term marital cheating, which is considered a pop language for a new phenomenon that is developing in society.

²² Whatsapp group interview *Salihah dan Sejahtera*, 15th December -18th January 2021. Group members refused to be identified. This unique group is guided by 3 *ustazah* and has 128 members with a fairly high level of communication interaction. The background of the group members is very diverse and is not tied to any political affiliation.

Legal provisions in Indonesia limit themselves to various written teachings that have been recognized in the regulations. Various social norms that develop in the community are considered less powerful and are not valid if there is already a legal formulation that has been ratified. There was little law recognition of customary norms.

The refusal of the presence of socio-juridical facts that live and develop in society is often considered as an ideal shield to refuse the concepts of crime that are recognized by society. The petition refuses several formulations of the provisions of the Civil Code that will be ratified by the government instead calls the norms that are believed to still exist in society as an unclear norm. By saying the law that lives and develops in society is difficult to prove.²³

The refusal of this living norm is strange and erroneous legal reasoning. This oddity of reasoning can be seen from the basic principles of the rule of law, including the criminal law, derived from social behavior in society. Law is a *volksgeist* expression that contains the nation's philosophy or a pattern of culture/personality that grows as a result of experiences and traditions that have occurred in the past.²⁴ Various rules that are not accommodated in written legal rules but are alive and are believed to exist must still be respected as part of the law that must be respected.

The law adopted by most Indonesians is living law, not just written law. The majority of people do not always know, memorize, or use the textual rules contained in written law books. The level of submission and obedience to legal norms is precise because they know it from living law. A simple example can be seen in the reluctance of community members to commit crimes because they know the chapters on theft, murder, and adultery in

²³<https://www.change.org/p/presiden-jokowi-jangan-setujui-rkuhp-di-sidang-paripurna-dpr-ri-semuabisakena> accessed on 11th February 2021.

²⁴ Sunarjati Harsono, *Kapita Selekta perbandingan hukum* (Bandung: Citra Aditya, 1989), 96-97.

the Civil Code. People do not commit these crimes because they think that the act of stealing, killing, and having sexual relations outside of marriage is prohibited by religion and customs that they believe in.

The knowledge of the community that recognizes and accepts legal values in society becomes a valuable social capital in law enforcement. Social norms that are in line with legal norms not only have a significant role in regulating individual relationships with individuals but also regulate individual relationships with other community groups.²⁵ Various people's beliefs about social norms provide excellent social capital in not only law enforcement but also the mandate of Law 12 of 2011 concerning the formation of Laws and Regulations to accommodate social norms in society.²⁶

Misunderstanding of legal norms that live and develop in society is seen when the discussion of these norms is related to aspects of law enforcement. Those who refuse the role of customary law in the development of national law always limit the effectiveness of customary law in the level of compliance and implementation of sanctions. The compliance of indigenous peoples with customary law and the effectiveness of the sanctions mechanism they have is considered no longer under the social dynamics that develop in the community. Surprisingly, they think that the criminal law made by the colonialists is considered more capable of guaranteeing the effectiveness of the implementation of the law.

Laws that live in society get higher compliance than the written rules in the Civil Code. Threats in the actions of marital cheating, for example, various ethnic groups in Indonesia have rules and sanctions mechanisms that are more feared than the concept of written law. The Javanese people recognize the actions of marital cheating as crimes that will have a direct impact on

²⁵ Ujianto, Singgih Prayitno, *Sosiologi pembentukan peraturan perundang-undangan* (Jogjakarta: Azza Grafika, 2012), 73-75.

²⁶ Ujianto, Singgih Prayitno, "Membangun Keberadaban Masyarakat Prespektif Sosiologi Legislasi", Oration for the inauguration of the research professor of the House of Representatives of the Republic of Indonesia , 28th November, 2018, 18-21.

themselves, their families, and their descendants. The Bugis and Madurese tribes consider the act of marital cheating to be a despicable act, forbidden to do, and stipulate death as the maximum punishment that can be given for marital cheating of the crime. Even more advanced concepts are given by the Ngaju Dayak community. The noble Dayak customary law provides concrete practice models for resolving disputes about marital cheating.

Legal studies on marital cheating are even more confusing when imposing marital cheating as part of the offense of adultery. At first glance, various studies identify and consider marital cheating to be part of the act of adultery. Whereas the act of marital cheating with adultery is two different forms of legal action.²⁷ Sometimes, other studies also widen the study of marital cheating by linking them with other criminal acts, namely the crime of forgery and the crime of marriage.²⁸

The assumption of the various studies above is strange, and adultery is limited to sexual relations between marital cheating, while marital cheating is not limited to sexual relations alone. Marital cheating does not necessarily use sexual charm to carry out his crimes. Moreover, using adultery as a crime mode to carry out his crimes. Therefore, the assumption of some people who associate marital cheating actions with adultery alone cannot be accepted. The actor wants to seize, possess, and control a legal partner who is already owned by someone, not just a sexual fantasy.

The prohibition against accusing adultery in the perspective of Islamic law is clearly explained in the *Quran*. This prohibition is even unique because it provides clear and firm legal sanctions. When compared to the various prohibition norms that mostly stop at mere ethical sanctions, the prohibition against accusing others of adultery is given in a clear legal clause. The act

²⁷ Putri Fransisca, *Upaya Hukum*, 215-217.

²⁸ Elok Ningtyas Rahmawati, "Perebut Laki Orang (pelakor) dalam Pernikahan Prespektif Maqashid al Shariah di Surabaya", (Thesis--PPS UIN Sunan Ampel Surabaya, 2018), 47-49.

of accusing another person of adultery that cannot be proven has two legal sanctions at once. First, ethical sanctions in the hereafter will be in the form of curses in the hereafter and a great punishment.²⁹ Second, other people's adultery accusers who fail to prove their accusations will receive physical sanctions in the form of 80 lashes, repeal of juridical social rights before a court, and embedding a godless title.³⁰

The error of linking marital cheating with the offense of adultery is increasingly clear when it is connected with the formulation of adultery in Chapter 284 of the Civil Code. The clause in this chapter limits adultery as an *overspel* by a person who is married or has ever been married. The legal sanctions are also limited to marital cheating and people who participate in committing adultery. This chapter explains that the sentence is nine months in prison.

The formulation of Chapter 284 above shows that adultery has a special form compared to other immoral acts. Arrest Hoogeraad 05th February 1912, explained that the act of adultery (copulation) is intercourse between the male and female genital which is usually carried out to get children, the male genital must enter the female genital so that sperm comes out.³¹

The actor's actions cannot be directly related to *overspel*. There is no similarity between the two acts. The provisions of Chapter 284 of the Civil Code state that adultery is an act of *opzettelijk* delict. The actions of the parties arrested in this chapter must be in the form of intentional acts and can be proven in court. In addition, the formulation of Chapter 284 also requires *vleeselijk gemeenschap* or completed sexual intercourse between two people of different sexes.³² Sexual intercourse as regulated in the

²⁹ Qs. surah Al-Nūr verse 23.

³⁰ QS. Al Nūr, 4.

³¹ R. Soesilo, *KUHP: Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Bogor: Politeia, 1995), 209.

³² Umi Rozah, Erlin Indarti, "Delik Zina: Unsur Substansial Dan Penyelesaiannya Dalam Masyarakat Adat Madura", in *Jurnal Masalah-Masalah Hukum*, Vol. 48, No. 4, October 2019, 366-375.

formulation of Chapter 284 is also limited to marital cheating who are married or have been married. If the marital cheating adultery is not bound by marriage or has never been married, their adultery cannot be called adultery. In simple terms, the anatomy of the difference between actors and *overspels* is as follows.

The Anatomy of the Differences between Marital Cheating and Adultery

| Differences | <i>Overspel</i> | Marital Cheating |
|------------------|-------------------------------|---------------------------------|
| Law-based | Chapter 284 of Civil Code | Spread |
| Action | Limited to sexual intercourse | Does not have to be sexual |
| Actor | Married or ever married | Single, married or ever married |
| Delict character | Absolute complaint | Has not been formulated |
| Sanction | Principal crime | Social |
| Type of crime | Immoral | Has not been accommodated |
| Motive | Sexual pleasure | Couple fight |
| Mode | Sexual intercourse | Unlimited |

The difference in the material and formal formulations contained in the chapter is very different from the actions of the actors. Actors do not always use adultery as a medium used to seize other people's partners. Actors can use other charms beyond their sexual abilities and skills. If you only want to commit adultery, then marital cheating does not need to do it with someone's legal partner. The marital cheating is enough to vent his actions with the prostitute who provides his services.

The difficulty of arresting marital cheating using a criminal law perspective leads to a mistake in using the principle of unlawful acts that determine the legitimacy of the crime must refer to the provisions of the Civil Code. The classic assumption contained in Chapter 1 of the Civil Code does not directly remove

various rules that already exist, are believed, practiced, and have not been accommodated in the Civil Code.³³

The principle of legality was born from the desire to limit the arbitrariness of the authorities in determining the mistake that was misused. At first, the form of mistake refers to the decision of the ruler (*subjective schulder*). Rulers are allowed to make various rules that have legitimacy in their power only. As for himself, his relatives, family, or other parties who are considered to have a close relationship with the authorities cannot be trapped by legal provisions.³⁴

The arbitrariness of this ruler was later removed with the presence of the principle of legality, which stipulates that crimes must refer to a standard formulation of chapters that apply to all parties. The principle of legality is *lex scripta*, (written), *lex certa* (having the certainty of measure), *Mens rea* (criminals can commit and can be punished), and non-retroactive. This element then gave birth to a principle commonly referred to as “*Geen delict, geen straf zonder een voorfgaande strafbepaling*” (there is no crime without a measure of mistake).

The formulation of the elements of the principle of legality above is possible to be accepted in the criminal law perspective. Unfortunately, the strong influence of the legality principle forgets another formulation of the benchmark for a criminal act, namely the material criminal principle, which refers to three measures. The three measures include the state not harmed, recognition of the norms that live in the society (the society is served), and the defendant cannot sue.³⁵

Besides the considerations of material criminal law above, many people forget the influence of customary law on criminal law

³³ Erlina Maria Christn Sinaga and Sharfna Sabila, “Politik Legislasi Hukum Tidak Tertulis Dalam Pembangunan Hukum Nasional”, in *Jurnal Rechtsvinding: Media Pembinaan Hukum Nasional*, Vol. 8, No. 1, April 2019, 3-4.

³⁴ Loebby Loqman, *Perkembangan Asas Legalitas Dalam Hukum Pidana Indonesia*, on seminar about *Asas-Asas Hukum Pidana Nasional*. By: BPHN Kemenkumham and Undip. Semarang, 26 – 27 April 2004.

³⁵ Teguh Prasetyo, *Hukum*, 73.

enforcement. Not all criminal acts are effectively resolved by legal rules written in the formulation of the law alone. Mardjono mentions that various customary law rules have a real influence on law enforcement in society. In the case of marital cheating, for example, the consideration of *overspel* crimes contained in the provisions of the criminal law does not have to use the formulation of criminal and civil law only but also considers the formulation of customary civil law to understand it.³⁶

Mardjono's explanation is more interesting with evidence of adaptation of criminal law enforcement that takes into account customary criminal law. Mardjono gave an example that the Civil Code is not always able to reach the concept of crime contained in social behavior in society. Various crime phenomena have been decided by the judiciary using customary norms. Mardjono's data provides legitimacy for court judgment using customary law. The reason is customary offenses have no equivalent in WvS. The following are some of the verbatim data provided by Mardjono.³⁷

Recognition of Community Moral Norms by the Court

| Decision Number | Location | Crime | Decision Form |
|------------------------|-------------|--|---|
| Number 423/HN/1952/Kej | PN. Mataram | <i>Tan satyari wacana</i> inappropriate conversation | <i>Methirtha gamana</i> (looking for three springs) |
| Number 11/Pid.1972 | PN. Gianyar | <i>Logika sanggraha</i> Impregnating women and refusing responsibility | Three months in prison and customary law |
| Number 32/Pid.b/1987 | PT. Sulteng | <i>Siri'</i> | <i>Prohala</i> Paying a buffalo and giving a piece |

³⁶ Mardjono Reksodiputro, *Pembaharuan Hukum Pidana* (Jakarta: PPPKP UI, 1997), 102-103.

³⁷ Ibid., 105-108.

| | | | |
|-----------------------|----|---|---|
| | | | of white cotton cloth |
| Number 3898K/Pdt/1989 | MA | <i>Pualeu-manleu</i> Impregnating women and refused responsibility | <i>Tatam Fani benas</i> Compensation for several cows and some money |

The legitimacy of the use of customary offenses has long existed and has been submitted to the judiciary. This recognition appears not only in the form of adaptation of customary norms as part of legal considerations when a court judgment is made. This recognition is an order that must be carried out by law enforcement officers when carrying out their duties. Therefore, Roeslan Saleh criticizes those who refuse customary law in the legal system in Indonesia. Roeslan considers that there is a socio-legislative gap between the criminal law and the factual conditions of Indonesian society. Decency and politeness norms existed before the Dutch came and Indonesia independence. The various legal rules contained in the Criminal Code accommodate very few legal norms that live in society.³⁸

The views of Roeslan Saleh and Mardjono are interesting and related to the phenomenon of marital cheating in society. The assumption that marital cheating is not included in unlawful acts is ahistorical and non-juridical. Indonesian society in any socio-juridical corridor considers that marital cheating is a despicable act and must receive legal sanctions. Exempted the actors from responsibility on the assumption that there are no criminal law rules is non-juridical.

Opportunities to arrest marital cheating are indeed difficult from the perspective of criminal and civil law. This difficulty arises from the process of acknowledging the legal relationship carried out by the actor. The legal relationship between them is only considered a social relationship. The theory

³⁸ Roeslan Saleh, *Perbuatan Pidana dan Tanggung Jawaban Pidana* (Jakarta: Aksara Baru, 2018), 14-15.

of legal relations that has developed only limits the legal responsibilities that arise if their relationship is regulated by law.³⁹

Reduction of the formulation of legal responsibility cannot be given to actors because their relationship is not regulated by law, this is excessive. Various legal relationships cannot be limited to actions that violate the law. Appropriately, legal relations can use the term unlawful act, which is associated with a violation of other regulations outside the written legal rules. Wirjono Projodikoro revealed that various other regulations of this law violate various other social norms in the form of decency, politeness, and religious norms.⁴⁰

Recognition of the existence of unwritten legal norms outside the Civil Code is not an obsolete formula contained in the traces of past laws. The Second Amendment to the 1945 Constitution of the Republic of Indonesia clearly explains in Chapter 18 B (2) that the State recognizes and respects customary law community units and their customary rights as long as they are alive and following society development. The same thing can also be found in the obligations of legal officers who are required to explore the values of justice in society. Law number 48 of 2009 concerning Judicial Authorization Chapter 5 (1) Jo. Chapter 50 (1) gives an obligation to judges to acknowledge the existence of a law that lives in the society and include it in the decision if necessary.

Another recognition of the existence of social norms in society can be found in Law no. 16 of 2004 concerning the Prosecutor's Office. The provisions contained in Chapter 8 section 4 provide the prosecutor with the obligation to act law based on heeding norms of religion, politeness, decency, and having an obligation to explore and uphold human values that live in society.

Moeljatno explained more interesting about the existence of social norms that are not contained in the Civil Code. The provisions of customary law that are not accommodated in the

³⁹ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta; Prenada Mulia, 2012), 216-217.

⁴⁰ Wirjono Projodikoro, *Perbuatan melanggar hukum dipandang dari sudut hukum perdata* (Bandung; Mandar Maju, 2000), 6-8.

Civil Code do not indicate that these norms are not recognized in the Indonesian legal system. This norm exists and applies with the existence of the 1945 Constitution of the Republic of Indonesia RT Number 1 of 1951 (1/1951) concerning temporary measures to organize a unified structure of authorities and procedures for civil courts. Moeljatno explained that the provisions contained in 5 section 3 (B) provide a strong basis for the application of customary law and no one will dispute the provisions.⁴¹

Legal recognition of the existence of decency norms and experience of customary criminal enforcement in providing a variety of concrete evidence - how to arrest marital cheating using various social norms that have been recognized by the society, requires a complicated evidentiary process. However, if it is possible to take various legal remedies, the marital cheating can be arrested and accept legal responsibility for his actions.

Conclusion

The assumption about men cheating and women cheating that unwritten law in Indonesia is not under historical facts. The historical facts prove that the rule of Indonesia's law can arrest men cheating and women cheating. The rules regarding unlawful acts are fulfilled by various historical facts of a court judgment that provide punishment for marital cheating even though their actions are not written in the Civil Code. The judiciary proves the principle of legality which requires the clear written legal rules that existed before marital cheating action.

The urgency of the socio-legislation that arrests marital cheating must be carried out immediately. Norms that live and develop in society are not only recognized for their existence by various regulations but also proven to provide solutions for solving the actions of marital cheating. Law enforcement should be given to the actor, such as fines to maintain the relationship between actor and victims as in the customary of Dayak Ngaju,

⁴¹ Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta; Rineka cipta, 2008), 28.

Kupang, and Balinese or the death penalty for men cheating and women cheating as the legal belief of the Madurese and Bugis people. The *eigen richting* phenomenon, law enforcement anomalies, and a large number of victims of marital cheating must be accommodated immediately in a clear law enforcement process.

The refusal of some community groups related to the customary law in the enforcement of moral norms must be ended immediately. The two main bases to end the refusal are social norms outside the Civil Code are recognized by the 1945 Constitution of the Republic of Indonesia and various related rules in law enforcement. The norms above are proven to contribute the law enforcement and help the civilized society development.

References

- Ahmad Bin Syu'aib Abu Abdir Rahman an-Nasa'I. *Sunān An-Nasā'ī*. Cet II, Juz VI, Aleppo: Maktab al-Madbuat al-Islamiyah, 1986.
- Ahmad, Muhammad Hazim (et. all). *Proving Takhbīb Criminal Offense In Syariah Court Through Digital Forensic Evidence And Expert Opinion in Syariah And Law Discourse*. Special Series E-Proceeding of the 2nd International Conference of the Postgraduate Students and Academics in Syariah and Law (INPAC) 2019.
- Alfian, Susanto Yunus. "Pararaton Sebagai Sumber Sejarah: Pemanfaatannya dalam Pembelajaran Di Era Digital", *Jurnal Pendidikan Sejarah Indonesia: JPSI*, Vol. 2, No. 1, 2019.
- Hadjon, Philipus M. and Tatiek Sri Dajtmati. *Argumentasi Hukum*. Jogjakarta: Gajahmada Univ. Pres, 2005.
- Hardjowarno, R. Pitono. *Pararaton*. Malang: Brathara, 1962.
- Harsono, Sunarjati. *Kapita Selekta perbandingan hukum*. Bandung; Citra Aditya, 1989.
- Loqman, Loebby. *Perkembangan Asas Legalitas Dalam Hukum Pidana Indonesia*, on the seminar about "Asas-Asas Hukum Pidana

- Nasional” by: BPHN Kemenkumham and Undip. Semarang, 26th – 27 th April 2004.
- Manan, Abdul. *Aspek-Aspek Pengubah Hukum*. Jakarta: Prenada Mulia, 2013.
- Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Prenada Mulia, 2015.
- Marzuki, Peter Mahmud. *Pengantar Ilmu Hukum*. Jakarta: Prenada Mulia, 2012.
- Moelyatno. *Asas-Asas Hukum Pidana*. Jakarta: Rineka cipta, 2008.
- Prasetyo, Teguh. *Hukum Pidana*. Jakarta: Rajawali Grafindo, 2015.
- Pratiwi, Putri Fransiska Purnama, (et.all). “Upaya Hukum untuk Menjerat Tindakan Pelakor dalam Perspektif Hukum Adat Dayak Ngaju”, *Jurnal Cakrawala Hukum*, Vol. 10, No. 2, Desember 2019.
- Projodikoro, Wirjono. *Perbuatan Melanggar Hukum Dipandang Dari Sudut Hukum Perdata*. Bandung: Mandar Maju, 2000.
- Rahmawati, Elok Ningtyas. “Perebut Laki Orang (Pelakor) dalam Pernikahan Prespektif Maqashid Al Shariah di Surabaya”, Thesis--PPS UIN Sunan Ampel Surabaya, 2018.
- Reksodiputro, Mardjono. *Pembaharuan Hukum Pidana*. Jakarta: PPPKPH UI, 1997.
- Rokhyanto dan Marsuki. “Sikap Masyarakat Madura Terhadap Tradisi Carok: Studi Fenomenologi Nilai-Nilai Budaya Masyarakat Madura” *el Harakah journal*, Vol. 17, No. 1, 2015.
- Rozah, Umi and Erlyn Indarti, “Delik Zina : Unsur Substansial Dan Penyelesaiannya Dalam Masyarakat Adat Madura”, *Jurnal Masalah-Masalah Hukum*, Vol. 48, No. 4, Oktober 2019.
- Saleh, Roeslan. *Perbuatan Pidana dan Tanggung Jawaban Pidana*. Jakarta: Aksara Baru, 2018.
- Sinaga, Erlina Maria Christin and Sharfna Sabila. “Politik Legislasi Hukum Tidak Tertulis Dalam Pembangunan Hukum Nasional”, *Jurnal rechtsvinding: media pembinaan hukum nasional*, Vol. 8, No. 1, April 2019.
- Soesilo, R. KUHP; Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal. Bogor: Politea, 1995.

- Sutoyo. "Integrasi Tasawwuf Dalam Tradisi Kejawaan Persaudaraan Setia Hati Terate", *Teosofi; Jurnal Tasawwuf Dan Pemikiran Islam*, Vol. 4, No. 2, December 2014.
- Ujianto, Singgih Prayitno. "Membangun peradaban masyarakat Prespektif sosiologi legislasi", Oration for the inauguration of the research professor of the House of Representatives of the Republic of Indonesia, 28th November, 2018.
- Ujianto, Singgih Prayitno. *Sosiologi Pembentukan Peraturan Perundang-Undangan*. Jogjakarta: Azza Grafika, 2012.
- Instruksi Presiden Republik Indonesia No 1 tahun 1991 tentang Penyebarluasan Kompilasi Hukum Islam.
- Undang-undang No 1 Tahun 1946 tentang Kitab Undang-Undang Hukum Pidana.
- Undang-undang No 1 Tahun 1974 tentang Perkawinan.
- Putusan No: 139/Pid.B/2017 PN.PTK
- <https://www.youtube.com/watch?v=TWQeHkVN-so> Kompas TV, 08th February 2021. "Viral di Medsos Karena Kasus Istri Terseret Mobil, Wakil Ketua DPRD Sulut James Arthur Minta Maaf".
- <https://www.youtube.com/watch?v=HxgXZr6bIP0> 08th February 2021. "Heboh! Kesal Diselingkuhi Istri, Seorang Warga di Ponorogo Robohkan Rumah Sendiri".
- <https://putusan3.mahkamahagung.go.id/direktori/putusan/1eb1fc6aefff9b92d5768038b8a6d617.html> accessed on 9th February 2020.
- <https://www.antaranews.com/berita/42343/kasus-potong-jari-istri-oknum-dprd-ke-pengadilan> accessed on 08th February 2021.
- <https://www.change.org/p/presiden-jokowi-jangan-setujui-rkuhp-di-sidang-paripurna-dpr-ri-semuabisakena> accessed on 11th February 2021.
- <https://www.liputan6.com/news/read/2905333/ma-kabulkan-usul-pemberhentian-bupati-katingan-karena-kasus-zina> accessed on 12th February 2021.