



Sanctions for Zina Perpetrators: A Review of Interfaith Couples from the Perspective of the Criminal Code and Fiqh Jinayah

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ABSTRACT

This study analyzes the sanctions for adultery in interfaith marriages based on the Indonesian Criminal Code (KUHP) and Islamic criminal law (fikih jinayah). Using a normative legal method, this research applies both Islamic law and comparative law approaches to evaluate the differences in the regulation of adultery within the two legal systems. The data sources consist of primary legal materials (KUHP, Compilation of Islamic Law, the Book of Fikih Jinayah, and the Marriage Law) and secondary legal materials (academic literature and court decisions). The analysis is conducted descriptively-analytically using the triangulation of legal sources technique. The findings show that the KUHP only criminalizes adultery as infidelity within a marriage, whereas in fikih jinayah, any sexual relationship outside a lawful marriage is considered adultery. In Islam, interfaith marriage is not recognized. Thus, such a relationship is categorized as adultery. In contrast, under Indonesia's positive law, interfaith marriages can still be recognized through specific legal mechanisms. Additionally, apostasy (murtad) has different legal consequences: In fikih jinayah, the marriage is automatically annulled, while under the KUHP, the marital status remains valid until a court decision is made. This inconsistency presents challenges in harmonizing national criminal law. Legal reform is needed to balance social norms, state law, and the principles of Sharia to create a more inclusive legal system that is adaptive to the needs of Indonesian society.

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1. Introduction

Zina is an act that carries significant legal consequences, both in positive law and Islamic law. In Islamic law, Zina is categorized as a criminal offense (*jarimah*) with strict penalties, either in the form of *had* (fixed punishment such as stoning or flogging) or *ta'zir* (punishment determined by authority).¹ Meanwhile, in Indonesia's positive law, based on the Indonesian Criminal Code (KUHP), zina as regulated in Article 284 of the KUHP is identified with *overspel*,² which has a much narrower definition than zina in Islamic law. *Overspel* can only occur if one or both of the perpetrators are bound by marriage, meaning the scope of zina under the KUHP is more limited compared to Islamic law, which defines zina as sexual relations outside of marriage regardless of the perpetrators' marital status.³

One aspect that often sparks legal debate is the status of interfaith marriages. In Islamic law, marriage is a contract with both sacred and legal dimensions, mainly preserving lineage (*hifz an-nasl*)⁴ and fulfilling biological and emotional needs within a lawful and honorable framework.⁵ However, in Islam, the validity of an interfaith marriage depends on the religious status of the individuals involved.⁶ If the marriage is invalid, the relationship may be categorized as zina. In contrast, under Indonesia's positive law, as long as the marriage follows the applicable legal procedures, the relationship is not categorized as zina.⁷

¹ Nur Shofa Ulfiyati dan Akh. Syamsul Muniri, "Perbedaan Sanksi Bagi Pelaku Zina Dalam Hukum Pidana Islam Dan Hukum Pidana Positif," *USRAH: Jurnal Hukum Keluarga Islam* 3, no. 2 (2022): 80–94, <https://doi.org/10.46773/usrah.v3i1.482>.

² Eko Sugiyanto, Pujiyono Pujiyono, dan Budhi Wisaksono, "Kebijakan Hukum Pidana Dalam Upaya Penanggulangan Tindak Pidana Perzinahan," *Diponegoro Law Journal* 5, no. 3 (2016): 1–10, https://www.academia.edu/34113996/EKSISTENSI_HUKUM_KONTRAK_INNOMINAT_DALAM_RANAH_BISNIS_DI_INDONESIA.

³ Mahrus Ali dan Muhammad Abdul Kholiq, "Adopsi Nilai dan Prinsip Hukum Pidana Islam tentang Delik Kesusilaan Zina dalam Kitab Undang-undang Hukum Pidana Nasional," *Jurnal Hukum Ius Quia Iustum* 30, no. 3 (2023): 622–49, <https://doi.org/10.20885/iustum.vol30.iss3.art8>.

⁴ Lukman Arake, "Agama dan Negara Perspektif Fiqh Siyasah," *Al-Adalah: Jurnal Hukum dan Politik Islam* 3, no. 2 (2018): 79–116, <https://doi.org/10.35673/ajmpi.v3i2.200>.

⁵ A L I Hasan Ahmad Ad-Dary, "*Pernikahan Voluntary Childfree Perspektif Majelis Ulama Indonesia (MUI) Kota Padangsidempuan*," n.d., 60.

⁶ The law regarding interfaith marriage in Islam has strict limitations. A Muslim man is allowed to marry a woman from the People of the Book (Jews or Christians) according to some scholars, based on Surah Al-Maidah, verse 5, although others prohibit it due to the potential risks to faith. However, marriage between a Muslim man and a non-Muslim woman other than from the People of the Book, such as a Hindu or Buddhist, is generally prohibited by the majority of scholars based on Surah Al-Baqarah, verse 221, and is considered invalid. Meanwhile, marriage between a Muslim woman and a non-Muslim man, including those from the People of the Book, is prohibited by all scholars based on Surah Al-Baqarah, verse 221, and Surah Al-Mumtahanah, verse 10, making it invalid in Islam. Thus, in Islamic law, only the marriage between a Muslim man and a woman from the People of the Book has differing opinions among scholars. In contrast, other forms of interfaith marriage are generally considered invalid.

⁷ Article 2, paragraphs (1) and (2) of Law No. 1 of 1974 state that a marriage is valid if it is conducted according to the laws of each partner's religion and must be registered by applicable regulations. However, in practice, interfaith couples often seek alternative means of legalization, such as temporarily converting to

The differing perspectives between the Criminal Code (KUHP) and Fiqh Jinayah raise questions about how the legal sanctions for zina in the context of interfaith marriages should be understood and applied.

The study of legal sanctions for zina perpetrators has become one of the main focuses in legal studies, particularly from the perspective of the Indonesian Criminal Code (KUHP) and Fiqh Jinayah. Various studies show that the current regulations still adopt the Dutch legal system, which only categorizes zina as a criminal offense if committed by individuals who are married and can be prosecuted through a complaint-based offense. However, this system does not fully represent Indonesian society's social and moral norms, which tends to have a broader definition of zina. This creates a mismatch between the positive law in force and the socio-religious norms society holds. Previous studies have confirmed this difference, but there is still debate on how the ideal law can be implemented to accommodate these differences.

A study conducted by Indrawan Fajar Bin Zaufi Amri et al. (2018) found that public perception of zina is broader than the definition adopted by the Indonesian Criminal Code (KUHP). Indonesian society tends to view all forms of sexual relations outside of marriage as zina, including those conducted by unmarried individuals. In contrast, the KUHP only criminalizes zina committed by those who are married through a complaint-based offense mechanism. The implications of this finding indicate a gap between normative law and the law that exists in society (living law), which can create uncertainty in applying the law.⁸ However, this study does not specifically address the implications of this discrepancy on criminal law reform or the potential adoption of Fiqh Jinayah principles in national law.

Building on previous studies, research conducted by Supardin and Abdul Syatar (2021) highlights the weaknesses in Article 284 of the Indonesian Criminal Code (KUHP), particularly regarding its definition and sanctions. They argue that this regulation is still very limited in reflecting the evolving legal norms in society, thus requiring criminal law reform to strengthen legal certainty and moral values within the community.⁹ Meanwhile, a study by Miswardi (2022) reveals that the weakness of the regulation in the KUHP has contributed to an increase in zina cases in society, indicating a moral degradation that the existing legal system has not adequately anticipated. One of the main problematic factors identified is the

another religion to meet the marriage requirements or conducting two religious ceremonies to align with their respective beliefs. Both methods are considered legal circumvention because they circumvent the existing marriage regulations without legal certainty.

⁸ Indrawan Fajar Bin Zaufi Amri dan M. Dachran S. Busthami, "Adultery in the Perspective of Islamic Law and the Criminal Law Legislation a Comparative Study," *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* Volume 23, no. Issue 2 (2018): Ver. 1, <https://doi.org/10.9790/0837-2302015155>.

⁹ Supardin dan Abdul Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law: Alternatives in Indonesia's Positive Legal System Reform," *Samarah* 5, no. 2 (2021): 913–27, <https://doi.org/10.22373/sjkh.v5i2.9353>.

nature of the complaint-based offense in the KUHP, which results in many cases being unable to be processed legally, even though significant violations of social norms have occurred.¹⁰ Therefore, there is an urgent need to reform the KUHP to make it more adaptive to Indonesia's social norms and moral values. However, these studies have not specifically discussed how legal reform should be carried out and to what extent Islamic criminal law can be an alternative solution within the national legal system.

In the context of comparative law, the research by Ahmad Adanan Nasution and Mar'ie Mahfudz Harahap (2024) makes an important contribution by comparing the complaint mechanism in the new Indonesian Criminal Code (KUHP) and Fiqh Jinayah. This study found that the new KUHP still retains zina as a complaint-based offense that can be withdrawn before trial, while Fiqh Jinayah considers zina a violation of Allah's law that cannot be withdrawn once proven.¹¹ These findings further clarify a fundamental difference in the legal philosophy between the KUHP and Fiqh Jinayah, where the KUHP places more emphasis on individual protection and reconciliation opportunities. At the same time, Fiqh Jinayah focuses more on enforcing moral values and divine justice. However, this study is limited in discussing how this difference impacts more complex cases, such as zina in interfaith marriages, which have different legal statuses in the KUHP and Fiqh Jinayah.

The gap in research regarding the regulation of zina in interfaith marriages is still very limited in academic studies. To date, there has been no study that specifically analyzes the legal sanctions for perpetrators of zina in interfaith marriages using a comparative approach between the Indonesian Criminal Code (KUHP) and Fiqh Jinayah. Most previous studies have only focused on the general regulation of zina, without further examining the discrepancies in the legal treatment of interfaith couples involved in zina cases. Additionally, the lack of research on the legal implications for interfaith couples can create legal uncertainty, especially because, in Islamic law, interfaith marriage is considered invalid. In contrast, in state law, marital status is still recognized, even through manipulative means such as temporary conversion, marrying abroad, or performing two religious ceremonies to align with each individual's beliefs. This uncertainty is a crucial issue that needs further examination, particularly in the context of national legal harmonization.

This study addresses the academic gap by analyzing the status of interfaith marriages and their legal consequences in the Indonesian Criminal Code (KUHP) and Fiqh Jinayah. This study will highlight the legal implications for interfaith couples, particularly concerning the uncertainty of the legal status of their marriage and its consequences on the classification

¹⁰ Miswardi, "Adultery in Perspective of Indonesian Criminal Law and Islamic Criminal Law," *Budapest International Research and Critics Institute-Journal (BIRCI-Journal 5*, no. 3 (2022): 18836–44.

¹¹ Ahmad Adanan Nasution dan Mar'ie Mahfudz Harahap, "Complaints by Victims of Adultery Offenses: A Comparative Study of Penal Code and Islamic Law," *Al-Ishlah: Jurnal Ilmiah Hukum 27*, no. 2 (2024): 201–14, <https://doi.org/10.56087/aijih.v27i2.484>.

of zina in two legal systems. Under state law, prior to the issuance of the Supreme Court Circular (SEMA) No. 2 of 2023 regarding Guidelines for Judges in Adjudicating Marriage Registration Applications Between Different Religions and Beliefs,¹² interfaith marriages were legally recognized based on jurisprudence, namely the Supreme Court Decision No. 1400 K/Pdt/1986. This decision affirmed that interfaith marriages were valid in Indonesia through a court ruling. However, in Fiqh Jinayah, this marriage status is invalid; therefore, the husband and wife relationship in this context could be categorized as zina. This inconsistency can potentially create legal confusion for those involved and presents challenges in applying criminal sanctions. Furthermore, this study will identify and analyze the legal gaps in the KUHP regulation, which has not fully accommodated the complexities of zina cases in interfaith marriages, including aspects of the definition, legal limitations, enforcement mechanisms, and legal protection for the affected parties. Therefore, this study also considers the perspective of Islamic criminal law as an alternative to the reform of criminal law in Indonesia, aiming to offer a more comprehensive approach to this issue.

This study has academic and practical significance in criminal law and society in Indonesia. With the increasing number of interfaith marriages, there is a need for a deeper, comparative legal study to understand how current regulations address criminal acts of zina in the context of interfaith marriages. The inconsistency between the Indonesian Criminal Code (KUHP) and Fiqh Jinayah can create legal uncertainty for interfaith couples and present challenges for law enforcement authorities in interpreting and applying the existing rules. Therefore, this study offers a comprehensive legal analysis that outlines the differences in regulations between the two legal systems and provides policy recommendations based on more adaptive and inclusive legal solutions. Thus, this study not only enriches the literature on criminal law and Islamic law but also offers concrete contributions to formulating regulations that align with social norms and the legal needs of Indonesian society.

2. Legal Material and Methods

This study uses a normative legal method with an Islamic Law Approach and a Comparative Legal Approach to analyze sanctions for perpetrators of zina in interfaith marriages. The Islamic Law Approach refers to the Qur'an, Hadith, and Fiqh Jinayah literature that discusses the punishment for zina perpetrators and the concept of marriage legality in Islamic law. The Comparative Legal Approach is used to evaluate the differences in zina regulations between the Indonesian Criminal Code (KUHP) and Fiqh Jinayah, aiming to understand how these two legal systems address zina cases in the context of interfaith marriages.

¹² Pada poin 2 SEMA tersebut mengatur bahwa “Pengadilan tidak mengabulkan permohonan pencatatan perkawinan antar-umat yang berbeda agama dan kepercayaan.

The data sources in this study consist of primary and secondary legal materials. Primary legal materials include the Compilation of Islamic Law, the book of Fiqh Jinayah, and Law Number 1 of 1974 on Marriage, which serve as the basis for normative analysis. Secondary legal materials include legal journal articles, academic literature, and other relevant legal documents related to the subject of the study. Data are collected through the documentation method, examining various legal references supporting the comparative analysis between the Indonesian Criminal Code (KUHP) and Fiqh Jinayah.

The data are analyzed using a descriptive-analytical method to explain the legal concepts under study and identify regulatory gaps in the Indonesian Criminal Code (KUHP) related to sanctions for zina in interfaith marriages. A comparative legal approach is used to evaluate the differences in complaint mechanisms, the definition of zina, and the application of sanctions in the KUHP and Fiqh Jinayah. To ensure the validity of the research findings, legal source triangulation is applied by comparing various legal references to obtain a more objective and comprehensive understanding.

3. Results and Discussion

3.1. Definition of Zina in the Indonesian Criminal Code (KUHP) and Fiqh Jinayah

The definition of zina in the Indonesian Criminal Code (KUHP) is narrower than Fiqh Jinayah. In the KUHP, Zina is defined as sexual intercourse committed by a person who is married to someone other than their spouse. This means that the KUHP only categorizes zina as a criminal offense if the perpetrator is already married, while sexual relations between two unmarried individuals are not classified as zina. This concept is regulated in Article 284 of the old KUHP and in Article 411 of the 2023 KUHP, where zina is more associated with a violation of marital fidelity than with the morality of sexual relations in general. In Dutch colonial criminal law, the term zina was often associated with 'overspel' (adultery in marriage),¹³ which refers to sexual relations between a married person and someone outside the marriage.¹⁴ According to R. Soesilo, "overspel or gendak" is defined as sexual intercourse between a man or woman who is married to someone other than their lawful spouse. In order to be categorized as zina in the KUHP, sexual intercourse must occur based on mutual consent, and thus does not fall under the category of rape or sexual violence.¹⁵ With this approach, the KUHP places more emphasis on protecting marital fidelity than on enforcing the morality of sexual relations themselves.

In contrast, in Fiqh Jinayah, zina is defined as any form of sexual intercourse outside a marriage that is considered lawful according to Islamic law, regardless of the marital status

¹³ Teguh Kurniawan Z, Adelina Mariani Sihombing, dan Aurelia Berliane, "Konstruksi Politik Hukum Pidana Terhadap Delik Perzinaan Dalam Rancangan Kitab Undang-Undang Hukum Pidana," *Binamulia Hukum* 12, no. 1 (2023): 11–24, <https://doi.org/10.37893/jbh.v12i1.445>.

¹⁴ Sugiyanto, Pujiyono, dan Wisaksono, "Kebijakan Hukum Pidana Dalam Upaya Penanggulangan Tindak Pidana Perzinahan."

¹⁵ R. Soesilo. *Kitab Undang-Undang Hukum Pidana Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*. Bogor: Politeia, 1991, hal. 209

of the perpetrator. In Islamic law, zina is categorized into zina muḥṣan and zina ghair muḥṣan.¹⁶ Zina muḥṣan refers to zina committed by a person who is mature, of sound mind, free, and has previously been married lawfully. In other words, zina muḥṣan occurs if a lawful marriage previously bound the perpetrator according to Islam. On the other hand, zina ghair muḥṣan refers to zina committed by someone who has never been lawfully married.

This definition aligns with the views in the schools of Fiqh Jinayah that describe zina as sexual intercourse committed by individuals not bound by a lawful marriage according to Sharia. According to Syafi'iyah¹⁷, zina is the act of a man inserting his penis into the vagina of a woman who is not his wife or enslaved person, without any ambiguity. According to Malikiyah,¹⁸ zina refers to sexual intercourse between a man and a woman who is not his wife, either in the vagina or anus. According to Hanafiyah¹⁹, zina is intercourse between a man and a woman performed in the vagina, where the woman is not his slave and without ambiguity.

Islam explicitly forbids all forms of zina and sets clear rules for addressing this act. This is outlined in Surah An-Nur, verse 2, where Allah says:

الرَّانِيَةُ وَالرَّانِي فَأَجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ
وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ

The meaning:

Those who commit zina, both the woman and the man, should each be struck with a hundred lashes, and let not pity for them prevent you from (carrying out) the law of Allah, if you believe in Allah and the Last Day. And let their punishment be witnessed by a group of believers.

This concept shows that zina in Fiqh Jinayah includes all relationships outside a lawful marriage, whether committed by married or unmarried individuals. Islam emphasizes that marriage is the only institution that legitimizes sexual relations, so any relationship not based on a lawful contract is considered a violation of Sharia law.

As mentioned earlier, there are two types of zina in Fiqh Jinayah based on the Hadith of Rasulullah SAW.

عَنْ عَبْدِ اللَّهِ بْنِ الصَّامِتِ رَضِيَ اللَّهُ عَنْهُ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ خُذُوا عَنِّي، خُذُوا عَنِّي، فَقَدْ
جَعَلَ اللَّهُ لَهُنَّ سَبِيلًا، أَلْيَكُرُّ بِالْيَكْرِ جَلْدُ مِائَةٍ، وَنَفْيُ سَنَةٍ، وَالتَّيِّبُ بِالتَّيِّبِ جَلْدُ مِائَةٍ، وَالرَّجْمُ (رَوَاهُ مُسْلِمٌ

The Meaning:

From Abu Ubadah, he said that Rasulullah SAW said: "Take (the law) from me, take (the law) from me; indeed, Allah SWT has made way for them (the women), that is, a virgin who

¹⁶ Budi Kisworo, "Zina Dalam Kajian Teologis Dan Sosiologis," *Al Istinbath : Jurnal Hukum Islam* 1, no. 1 (2016): 24, <http://journal.iaincurup.ac.id/index.php/alistinbath/article/view/54>.

¹⁷ K.H. M.A.Sahal Mahfudh, *Nuansa Fiqh Sosial, Lkis Pelangi Aksara*, 2023.

¹⁸ Mahfudh.

¹⁹ Mahfudh.

commits zina with a bachelor, their punishment is both to be flogged one hundred times and exiled for one year. As for a widow with a widower, both should be flogged one hundred times and stoned to death." (HR. Jamaah except for Al-Bukhari and An-Nasa'i)

This hadith emphasizes that Zina applies not only to married individuals but also includes unmarried individuals. Therefore, in Fiqh Jinayah, Zina has a broader scope than positive law, as it bases the legitimacy of sexual relations on a lawful marriage according to Islamic Sharia.

3.2. The Legal Status of Interfaith Marriages and Its Implications on Zina

The fundamental difference between the Indonesian Criminal Code (KUHP) and Fiqh Jinayah in regulating zina creates complex legal challenges, especially in the context of interfaith marriages. Under Indonesia's positive law, interfaith marriages can still be "recognized" through a court decree. This refers to the jurisprudence of the Supreme Court as stated in the Supreme Court Decision No. 1400 K/Pdt/1986, which declares that by applying for marriage registration at the Civil Registry Office, two individuals who agree to marry are consenting to the fact that the marriage is not conducted according to Islamic law.²⁰ In addition to the Supreme Court Decision, recognition of interfaith marriages can also be found in Law No. 23 of 2006 on Population Administration. Article 35 letter (a) regulates that marriage registration applies to marriages that the court decrees. The explanation of this article explicitly mentions that "marriages decreed by the court" refer to marriages between individuals of different religions.²¹

However, despite the jurisprudence providing an opportunity for the registration of interfaith marriages, recent legal developments show a tendency for the state to narrow the space for the legalization of such marriages increasingly. This is evident in the Supreme Court Circular (SEMA) No. 2 of 2023, which serves as a guideline for judges in adjudicating requests for the registration of marriages between individuals of different religions and beliefs. This SEMA emphasizes that a marriage is only considered valid if it is conducted based on the legal provisions of each couple's religion and belief, as outlined in Article 2, paragraph (1) and Article 8, letter f of Law No. 1 of 1974 on Marriage.²² Article 2, paragraph (1) stresses that "A marriage is valid if it is conducted according to the laws of each religion and belief." Meanwhile, Article 8, Letter F clarifies that "Marriage is prohibited between two individuals who have a relationship that is forbidden by their respective religions or other applicable regulations."²³ Therefore, with the issuance of this SEMA, the court is

²⁰ Hukum Online, "Update Peraturan Mengenai Kawin Beda Agama di Indonesia yang Perlu Kamu Tahu!," Hukumonline.Com, 2023, <https://www.hukumonline.com/berita/a/update-peraturan-mengenai-kawin-beda-agama-di-indonesia-yang-perlu-kamu-tahu-lt6524c8abccf5f/>.

²¹ Republik Indonesia, "lihat Penjelasan Pasal 35 huruf a Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan" (2006).

²² "Surat Edaran Nomor 2 Tahun 2023 tentang Petunjuk Bagi Hakim Dalam Mengadili Perkara Permohonan Pencatatan Perkawinan Antar-Umat yang Berbeda Agama dan Kepercayaan," *Mahkamah Agung Republik Indonesia*, 2023.

²³ Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 tentang Perkawinan" (1974).

obliged to reject requests for marriage registration for couples from different religions and beliefs.

In addition, the Constitutional Court, through Decision No. 71/PUU-XX/2022, further reinforces the prohibition of interfaith marriages. In this ruling, the Constitutional Court affirms that interfaith marriages are invalid under Law No. 1 of 1974 on Marriage.²⁴ Therefore, national law does not provide space for the recognition of interfaith marriages, thus further narrowing the possibility for interfaith couples to validate their marriages legally.

With the Supreme Court and the Constitutional Court tightening regulations, interfaith couples now face significant legal barriers in obtaining legal recognition of their marriage. In practice, various alternative efforts have been made to circumvent the limitations of the existing regulations. Some couples marry abroad and then apply for marriage registration in Indonesia.²⁵

In Fiqh Jinayah, interfaith marriages (especially those involving a Muslim and a non-Muslim) are not considered valid, except in the case of a Muslim man marrying a woman from the People of the Book (Christian or Jewish). This is by Surah Al-Ma'idah, verse 5:

الْيَوْمَ أُحِلَّ لَكُمْ الطَّيِّبَاتُ وَطَعَامُ الَّذِينَ أُوتُوا الْكِتَابَ حَلَالٌ لَكُمْ وَطَعَامُكُمْ حَلَالٌ لَهُمْ وَالْمُحْصَنَاتُ مِنَ الْمُؤْمِنَاتِ وَالْمُحْصَنَاتُ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ مِنْ قَبْلِكُمْ إِذَا آتَيْتُمُوهُنَّ أُجُورَهُنَّ مُحْصِنِينَ غَيْرَ مُسْفِحِينَ وَلَا مُنْجِدِي أَخْدَانٍ وَمَنْ يَكْفُرْ بِالْإِيمَانِ فَقَدْ حَبِطَ عَمَلُهُ وَهُوَ فِي الْآخِرَةِ مِنَ الْخَسِرِينَ

The meaning:

"On this day, lawful for you are all good things. The food (slaughtered) by the People of the Book is lawful for you, and your food is lawful for them. (Lawful for you to marry) chaste women from among the believers, and chaste women from among those who were given the Scripture before you, when you have given them their dowries to marry them, not to commit fornication, nor to take them as secret lovers. And whoever denies the faith after believing, his deeds are in vain, and in the Hereafter, he will be among the losers.

According to some scholars of tafsir, the term al-muḥṣanāt refers to women who preserve their chastity. Islam permits a man to marry such women, with the obligation to provide for them and fulfill their rights within marriage. However, this marriage should not be based on intentions that contradict Islamic teachings, such as merely using them as objects of desire or as concubines. In this context, a Muslim man is allowed to marry a woman from the People of the Book under certain conditions as outlined in Islamic teachings. On the

²⁴ Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 24/PUU-XX/2022," *Mahkamah Konstitusi Republik Indonesia*, 20222.

²⁵ Hardio A. V. Rompas, "SAHNYA PERKAWINAN BEDA AGAMA DITINJAU DARI SUDUT PANDANG UNDANG-UNDANG NOMOR 1 TAHUN 1974 KHUSUSNYA PERKAWINAN BEDA AGAMA YANG DILAKUKAN DI LUAR NEGERI," *Lex Privatum* VI, no. 9 (2018): 76–83.

other hand, a Muslim woman is not permitted to marry a man from the People of the Book, let alone a non-Muslim man who is not from the People of the Book. At the end of this verse, there is a warning that anyone who apostasizes after believing, their good deeds will be nullified, and in the Hereafter, they will be among the losers.²⁶

This difference emphasizes that Islamic law and positive law have different criteria in defining zina, whereas Islamic law determines the validity of marriage based on Sharia. In contrast, positive law relies on civil registration procedures and applicable jurisprudence. As a result, there is an inconsistency in the application of sanctions, where a relationship that is lawful under state law can still be considered zina from the perspective of Fiqh Jinayah.

Furthermore, another alternative taken by interfaith couples to legitimize their marriage under the Marriage Law is by "converting to another religion/belief." However, in some cases, this conversion is only temporary.²⁷ If, after marriage, one of the partners returns to their original religion (apostasy), an issue arises regarding the validity of their marital relationship, especially from the perspective of Fiqh Jinayah, which may categorize it as zina.

3.3. The Nullification of Marriage Due to Apostasy and Its Implications on Zina

In Islam, marriage is a sacred bond that is only valid when performed by two individuals who share the same religion. Islamic law does not recognize marriage between a Muslim and a non-Muslim, except in certain cases where a Muslim man is permitted to marry a woman from the People of the Book (Christian or Jewish). Therefore, if one partner in an Islamic marriage apostatizes or leaves Islam, the majority of scholars agree that the marriage is automatically annulled (fasakh), because one of the essential conditions for the validity of the marriage is no longer fulfilled.²⁸

This provision is based on several verses in the Qur'an, one of which is Surah Al-Mumtahanah (60:10), which emphasizes that a Muslim woman is not lawful for a non-Muslim man, and vice versa. Additionally, in Surah Al-Baqarah (2:221), Allah forbids marriage between a Muslim and a polytheist. Based on these verses, most scholars from the Shafi'i, Hanbali, and some Maliki schools of thought believe that if one of the partners in a marriage apostatizes, the marriage bond is automatically annulled without needing a court

²⁶ <https://quran.nu.or.id/al-maidah/5>, n.d.

²⁷ See Constitutional Court Decision No. 24/PUU-XX/2022, page 635. The Constitutional Judge Suhartoyo, the Constitutional Court Decision, highlights the phenomenon of legal circumvention conducted by interfaith couples, referred to as 'religious manipulation.' In this practice, one partner temporarily converts to another religion to perform a marriage according to the religious practices of either partner, to obtain a Marriage Certificate from the Civil Registry Office. After receiving the Marriage Certificate, one of the spouses reverts to their original religion before proceeding with the marriage.

²⁸ Yuyun Yulianah dan Cucu Solihah, "Apostasy As a Reason For the Dissolution of Marriage," *PENA JUSTISIA: MEDIA KOMUNIKASI DAN KAJIAN HUKUM* 23, no. 3 (2024): 700–715, <https://doi.org/https://doi.org/10.31941/pj.v23i3.5446>.

ruling. However, the Hanafi school of thought argues that the marriage does not immediately become invalid in some cases but requires a *fasakh* (annulment) decision from a judge.

The consequences of the annulment of marriage due to apostasy have significant implications in *Fiqh Jinayah*. In Islam, a marital relationship is only valid if it is based on a marriage that is lawful according to Sharia. If the marriage is annulled due to apostasy, the relationship that follows no longer has a valid legal basis in Islam. As a result, if the couple continues to live together and engage in marital relations after one of them apostatizes, then from the perspective of *Fiqh Jinayah*, the relationship can be categorized as *zina*. This is in line with the provisions in Surah An-Nur (24:2), which emphasizes that sexual relations outside of a lawful marriage constitute *zina* and are subject to certain penalties under Islamic law.

On the other hand, under Indonesia's positive law, marriage does not automatically become invalid simply because one of the partners converts to another religion. Article 2, paragraph (1) of Law No. 1 of 1974 on Marriage states that a marriage is only valid if it is conducted according to the laws of each partner's religion and belief. However, in cases where one of the partners converts, the state still recognizes the validity of the marriage until the court issues a divorce decree. Article 116 of the Compilation of Islamic Law (KHI) also mentions that differences in religion or a change in belief can be grounds for divorce. However, the couple must file a petition in court to obtain an official ruling.²⁹

The difference in approach between Islamic law and Indonesia's positive law creates the potential for legal conflict. Under positive law, a couple that continues to live together after one partner apostatizes is not considered to be violating the law because their marriage is still legally valid. However, from the perspective of *Fiqh Jinayah*, the marriage is considered annulled, and their relationship is no longer deemed valid. If they continue to live together, it may be categorized as *zina*. This illustrates the difference in how the validity of a marital relationship is defined between Islamic law and state law.

Thus, the annulment of marriage due to apostasy has significant implications in both Islamic law and Indonesia's positive law. In *Fiqh Jinayah*, the marriage is automatically annulled, and any following relationship is considered *zina*. However, the marriage is still considered valid under state law until a court decision invalidates it.

3.4. Sanctions for Zina Perpetrators: A Review of Spouses Who Are of Different Religions from the Perspective of the Indonesian Criminal Code (KUHP)

In the Indonesian Criminal Code (KUHP), the crime of *zina* is categorized as a complaint-based offense, meaning that legal proceedings can only occur if there is a report

²⁹ Azizah Linda, "Analisis Perceraian Dalam Kompilasi Hukum Islam," *Al-Adalah* 10, no. 2 (2012): 415–22.

from the party who feels aggrieved. Article 411 of the 2023 KUHP stipulates that zina occurs when a married person engages in sexual intercourse with someone other than their lawful spouse. If proven to have committed this act, the perpetrator may be imprisoned for up to 1 year.³⁰ Thus, the KUHP emphasizes the protection of the legally recognized institution of marriage, rather than focusing solely on moral aspects.

In the context of a married couple where one partner apostatizes but they continue to live together, the Indonesian Criminal Code (KUHP) does not categorize their relationship as zina. This is because, under state law, the marital status remains valid until the court issues a divorce decree. As a result, even though there has been a change of religion within the marriage, the relationship between the couple is still legally recognized. Therefore, no criminal sanctions can be imposed on couples who continue to live together as long as they are officially registered as husband and wife in the civil registry system.

This regulation reflects the principle that the legal status of marriage under the KUHP depends on administrative validity. This means there are no criminal consequences for couples who experience a change of religion in their marriage as long as they do not commit adultery or Zina outside the legally recognized marital relationship.

3.5. Sanctions for Zina Perpetrators: A Review of Spouses Who Are of Different Religions from the Perspective of Fiqh Jinayah

In Islamic law, marriage status heavily depends on the religious similarity between the spouses. If one of the partners apostatizes or changes religion, then according to the majority of Islamic jurisprudence scholars, the marriage may be annulled, as it no longer meets the condition of shared faith. In the Compilation of Islamic Law (KHI), Articles 75 and 116 state that a marriage annulled due to apostasy does not retroactively affect the children born from that marriage. However, the couple's marital status is considered invalid only after the decision becomes legally binding.

In Islamic criminal law or Fiqh Jinayah, apostasy (murtad) is classified as a jarimah hudud, a serious offense with penalties set based on the texts of Sharia (nash). However, some scholars argue that the punishment for apostates (murtad) should take into account the social and political context, especially if there is no threat to the Muslim community. The purpose of this punishment is to protect the faith (hifdz al-din) and uphold the social order by Islamic principles.

In the context of zina, Islamic law differentiates between the perpetrators who are married (muhsan) and those who are not married (ghairu muhsan). If a married person commits zina, the punishment is stoning to death, while for those who are unmarried, the punishment is 100 lashes, by Surah An-Nur, verse 2. The application of this punishment has

³⁰ Teguh Kurniawan Z, Adelina Mariani Sihombing, dan Aurelia Berliane, "Konstruksi Politik Hukum Pidana Terhadap Delik Perzinaan Dalam Rancangan Kitab Undang-Undang Hukum Pidana."

very strict conditions, such as the requirement of four fair witnesses who directly observe the act of zina, or a direct confession from the perpetrator four times.

In Fiqh Jinayah, if one of the spouses apostatizes but continues to engage in marital relations after the marriage has been annulled, they can be considered to have committed zina because their marriage is no longer valid under Islamic law. A Hadith from Abu Hurairah affirms that if a person apostatizes, they are no longer lawful for a Muslim. Therefore, intimate relations between spouses of different religions after one has apostatized are considered unlawful and potentially categorized as zina.

If, in a case, one of the partners apostasizes but continues to engage in marital relations, according to Fiqh Jinayah, the relationship may be considered zina ghairu muhsan. However, the application of hudud punishment requires very strong evidence. If this condition is not met, the punishment of ta'zir can be applied as an alternative. Thus, from the perspective of Fiqh Jinayah, a change in religious status within marriage brings serious consequences, including the annulment of the marriage and the potential imposition of zina sanctions for couples who continue to live together after apostasy.

4. Conclusion

This study shows fundamental differences between the Indonesian Criminal Code (KUHP) and Fiqh Jinayah in defining zina, recognizing the status of interfaith marriages, and applying sanctions to perpetrators of zina. The KUHP only criminalizes zina as adultery within marriage, while in Fiqh Jinayah, zina includes all sexual relations outside of a lawful marriage according to Sharia. In Islamic law, interfaith marriages are not valid, so the relationship in such a marriage can be categorized as zina. In contrast, under Indonesia's positive law, interfaith marriages can still be recognized through certain legal mechanisms, although recent regulations have increasingly narrowed the legalization of such marriages.

The legal implications of religious conversion (apostasy) in marriage also differ between the Indonesian Criminal Code (KUHP) and Fiqh Jinayah. In Fiqh Jinayah, the marriage is automatically annulled if one of the partners apostatizes, and any relationship that continues afterward is considered zina. Meanwhile, under the KUHP and national law, a change of religion does not automatically annul the marriage, and the couple is still considered valid until a court decision is made. This difference creates inconsistency in the application of the law, where a couple still legally valid under state administration can be considered to have committed zina in Islamic law.

This regulatory difference creates challenges in harmonizing national criminal law, especially in cases of interfaith marriage and religious conversion within marriage. The Indonesian Criminal Code (KUHP) needs to consider the social and moral norms that evolve in society, while Islamic law also faces challenges in the implementation of hudud due to the very strict evidentiary requirements. Therefore, further studies are needed to find legal solutions that can bridge these differences, in order to provide more inclusive legal certainty that aligns with the values prevalent in Indonesia.

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