

Expulsion for Adultery Perpetrators *Muhshan* at Panyabungan: An Islamic Law Perspective

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Abstract: This article examines the practice of expelling perpetrators *muhshan* in the Panyabungan society, which normatively (Islamic law) should be punished by stoning. This phenomenon is fascinating to study because the Panyabungan people are Islamic followers who are very fanatical and have a strong religion. This article is based on field data supplemented by library data. Three fundamental issues are examined in this article, namely the process of enforcing customary law for adulterers *muhshan* in Panyabungan society, the argument for the application of expulsion punishment to adulterers' *muhshan*, and how Islamic law views the practice of expulsion in the case of adultery. Uses a normative and sociological approach this article finds the fact that the practice of expulsion of adulterers *muhshan* in Panyabungan is enforced if the perpetrator has been proven to have committed adultery. The practice of expelling the perpetrators of *muhshan* adultery is carried out for two reasons: following the traditions or customs that have been in effect and the impossibility of applying the stoning law in Indonesia. This article also finds evidence that the purpose of imposing the penalty of expulsion for adulterers *muhshan* in Panyabungan is to give a deterrent effect to the perpetrators of adultery and, at the same time as a preventive measure for people not to commit adultery. In addition, the punishment is also intended to maintain the excellent name and cleanliness of the village from disobedience acts.

Keywords: *Adulterers muhshan; expulsion; Islamic law; customary law.*

Abstrak: Artikel ini mengkaji praktik pengusiran terhadap pelaku zina *muhshan* dalam masyarakat Panyabungan yang secara normatif (hukum Islam) seharusnya diberi hukuman rajam. Fenomena ini sangat menarik untuk dikaji karena masyarakat Panyabungan pada dasarnya termasuk penganut Islam yang sangat fanatis dan kuat beragama. Artikel ini didasarkan pada data-data lapangan yang dilengkapi dengan data-data kepustakaan. Ada tiga persoalan mendasar yang dikaji dalam artikel ini, yakni proses pemberlakuan hukum adat bagi pelaku zina *muhshan* pada masyarakat Panyabungan, argumen diterapkannya hukuman pengusiran terhadap pelaku zina *muhshan*, dan bagaimana hukum Islam memandang praktik hukuman pengusiran dalam kasus

perzinahan tersebut. Menggunakan pendekatan normatif-sosiologis, artikel ini menemukan fakta bahwa praktik pengusiran terhadap pelaku zina *muhshan* di Panyabungan diberlakukan apabila pelaku telah terbukti melakukan perzinahan. Praktik hukuman pengusiran terhadap pelaku zina *muhshan* tersebut dilakukan karena dua alasan, yakni mengikuti tradisi atau adat-istiadat yang telah berlaku dan tidak dimungkinkannya penerapan hukum rajam di Indonesia. Artikel ini juga menemukan bukti bahwa perapan hukuman pengusiran bagi pelaku zina *muhshan* di Panyabungan dimaksudkan untuk memberikan efek jera kepada para pelaku zina dan sekaligus sebagai upaya preventif bagi masyarakat supaya tidak melakukan perzinahan. Selain itu, hukuman tersebut juga dimaksudkan untuk menjaga nama baik dan kebersihan desa dari tindakan kemaksiatan.

Kata kunci: *Pezina muhshan; pengusiran; hukum Islam; hukum adat.*

Introduction

Based on the Islamic law norms listed in the text, the perpetrators of adultery can be sentenced by *bad az-zina* if it has been legally proven to commit adultery and fulfill the conditions and principles.¹ The sentence imposed between one case, and another is not necessarily the same. It all depends on the objective conditions of the perpetrator.² If the adultery is committed by male and female partners who have already carried out a legal marriage contract, and if the adultery is committed by couples who have never been legally married. If the perpetrator of adultery has never been legally married, the punishment is called *ghairu muhshan*. Meanwhile, for adulterers who have never been married, whether they still have a partner or are already a widower or widowers, the crime is called adultery *muhshan*.³

In addition to the Islamic legal norms mentioned, there is a practice of punishment for the perpetrators of adultery, that is applied by the people of the Panyabungan sub-district, namely the expulsion of the perpetrators of adultery. According to local traditional leaders, the punishment for expelling adultery perpetrators in Panyabungan

¹ Mustafa bin Mat Jubri and Miszairi Sitiris, "Analisis Pemberhentian Hukum Hudud Kerana Pemeliharaan Maqasid Al-Shari'ah," *AZKA International Journal of Zakat & Social Finance*, (2021), p. 68.

² Annisa Rahmadiana, Putri Nabilah, and Tiara Rahmawati, "Kajian Kriminologis Atas Sanksi Adat 'Cuci Kampung Terhadap Pelaku Zina,'" *Journal of Judicial Review* 24, no. 1 (2022), pp. 19–34.

³ Nurul Irfan, *Gratifikasi Dan Kriminalitas Seksual* (Amzah, 2022), p. 61.

District can only be carried out if their actions can be proven. The proof is obtained by direct testimony from witnesses and confessions from the perpetrators themselves.⁴

Interestingly, the expulsion punishment for adultery that applies in Panyabungan cannot be found in references and is not explained in the texts of *syara'*. There are only three types of punishment for adultery, as mentioned in the *syara's* texts, namely flogging, exiling, and stoning. Exile or expulsion is the second punishment after flogging. The expulsion punishment imposed on the perpetrators of adultery as practiced by the people of Panyabungan Subdistrict is not like the punishment in the norms of Islamic jurisprudence, namely first being whipped and then exiled for a year. The perpetrators of adultery who get the expulsion penalty are not given a period of exile (forever) and are not given flogging in advance.

Until now, many research that examines the punishment for adulterers *muhshan* has been written by several researchers with various themes and approaches. Based on a search of research with similar themes that have been studied, the authors categorize them into three categories.

First, research that discusses punishments for adulterers *muhshan* in the form of sanctions as stipulated in Islamic criminal law, which is called stoning. Lubis and Affan concluded that stoning is the ideal punishment for adulterers.⁵ According to Muzakir, punishment stoning is a severe punishment and is considered as punishment commensurate with the behavior that has been done.⁶ Kafisa mentioned that stoning is a sanction given by Allah directly to humankind. Therefore, there is no other appropriate punishment for adulterers except the law *of stoning*.⁷

⁴ Interview with Sarimuddin, traditional leaders, in his residence, on Mey 7, 2022.

⁵ Suaib Lubis and Syahrul Affan, "Hukuman Bagi Pelaku Zina Menurut Hukum Islam Ditinjau Dari Hak Asasi Manusia," *Stigma Jurnal Ilmu Sosial Politik Dan Humaniora* 1, no. 2 (2022), pp. 1–6.

⁶ Kahar Muzakir, "Zina Dalam Perspektif Hukum Islam Dan Kitab Undang Undang Hukum Pidana," *Formosa Journal of Science and Technology* 1, no. 1 (2022).

⁷ Tomy Kafisa, "Tinjauan Yuridis Terhadap Perbuatan Zina Dalam Perspektif Hukum Islam Dan Hukum Positif Studi Kasus Putusan PN Jayapura Nomor

Second, many research related to punishment for adultery *muhshan* are also discussed in a theological context by examining the arguments contained in religious texts. This purposed to see the accuracy of the argument regarding the sanctions given to the perpetrators of adultery. Almost all studies show that punishment is accurate for adulterers *muhshan* in the context of comparing arguments in religious documents, is stoned.⁸⁹ Other research, that is still in the category of research of this kind, only seeks to explain procedural sanctions for adultery, starting from gathering evidence to related parties affected by the crime of adultery.¹⁰ Taqiyuddin concluded that the death penalty for adulterers *muhshan* is a sanction that must be applied because there is no single text, which remove these sanctions in the Qur'an and hadith.¹¹

Third, the research that looks at customary sanctions for adulterers' *muhshan* and their relevance to Islamic law. Most studies like this, find that almost all punishments are for adultery *muhshan* only in the form of a fine that must be paid to customary elders. It is just that regional differences cause differences in nominal terms and the form of fines paid. In Bengkulu, for example, adulterers must pay a fine in the form of a goat.¹² In some places like Aceh, the perpetrators of adultery *muhshan* after being whipped will pay a fine using a certain

68/PID. B/2015/PNJAP Dan Putusan Nomor 2/JN/2021/MS. MBO", *PhD Thesis*, (Universitas Islam Riau, 2022).

⁸ Ridho Riyadi, "Zina Menurut Ali Ash-Shabuni Dalam Tafsir Shafwatu Tafasir," *Studia Quranika* 5, no. 2 (2021), pp. 192–218.

⁹ Alfiyatul Azizah and M. Ud Lc, "Hadd Zina Dalam Al-Quran (Kajian Tafsir Surat An-Nur) Ayat 1-3 Menurut Muhammad 'Ali As-Sabuni) Dalam Tafsir Rawat Al-Bayan Fi Tafsir Ayat AhKam Min Al-Qur'an", *PhD Thesis* (Universitas Muhammadiyah Surakarta, 2022).

¹⁰ Linda Ikawati, "Prostitusi Perspektif Hukum Positif Dan Hukum Islam," *Transformasi Hukum* 1, no. 1 (2022), pp. 13–22.

¹¹ Muhamad Taqiyuddin, "Pidana Mati Dalam Perspektif Al-Qur'an", *PhD Thesis* (Institut PTIQ Jakarta, 2021).

¹² Widia Moliza Indarti, "PENERAPAN SANKSI ADAT PERKAWINAN NGECIK NIOH PINANG TERHADAP PELAKU ZINA PERSPEKTIF HUKUM ISLAM (Studi Desa Napal Putih Kecamatan Napal Putih Kabupaten Bengkulu Utara Provinsi Bengkulu)", *PhD Thesis*, (UIN Fatmawati Sukarno Bengkulu, 2022).

amount of money.¹³ Meanwhile, in Papua, customary adultery law still uses money.¹⁴ In neighboring countries such as Johor, Malaysia, even though customary law is enforced in deciding sanctions, the penalty for adultery *muhshan* still refers to the country's laws.¹⁵

Based on the previous research above, it is clear that the theme of customary law for adulterers *muhshan* like expulsion form is almost untouched. This article will reveal the types of traditional punishments for adulterers *muhshan* what happened in Panyabung. Forms of punishment for adulterers *muhshan* is done by expelling a pair of adulterers *muhshan*. This research wants to answer, how is the customary law process in imposing sanctions on the expulsion of *muhshan* adulterers. Then why should the perpetrators be expelled? And what is the view of Islamic law towards the expulsion?

To answer some of the problems above, the authors use a normative sociological approach in the frame of analysis *ushul al-fiqh*. The change in Islamic law essentially refers to the Islamic *shari'a* it self, which is oriented towards benefit. This is reinforced by the statement of Ibn Qayyim al-Jauziyah, who said that a change in the law in Islam is a must because law is bound by various factors, including time, place, and custom factors.¹⁶ This view of Ibn Qayyim al-Jauziyah shows that Islamic law is flexible and adaptive in responding to reality (*al-Islām shālih li kulli zaman wa makān*). Shari'a can be interpreted using the reality of customs carried out by Muslims.¹⁷

According to Ibn Qayyim al-Jauziyah, the customary factor is equal to tradition. He thought that a mufti (the issuer of the fatwa) must

¹³ Fauza Andriyadi, "REPOSISI MAJELIS ADAT ACEH DALAM TATA PEMERINTAHAN ACEH PASCA QANUN NO. 10 TAHUN 2008," *IN RIGHT: Jurnal Agama Dan Hak Azazi Manusia* 5, no. 1 (2015).

¹⁴ Joe Daniel Daat, "PENERAPAN SANKSI ADAT TERHADAP PELAKU PERZINAHAN DI MASYARAKAT HUKUM ADAT SUKU KAWEI KABUPATEN RAJA AMPAT PROVINSI PAPUA BARAT", *PhD Thesis* (UNIVERSITAS ATMA JAYA YOGYAKARTA, 2022).

¹⁵ Mohd Rafi Mohd Sanusi, Syahrulnizam Saat, and Nasrul Hisyam Nor Muhamad, "Shariah Whipping Punishment In The State Of Johor: An Analysis From The Legal Provisions: Hukuman Sebat Syariah Di Negeri Johor: Analisis Dari Sudut Peruntukan Undang-Undang," *Al-Qanar: International Journal of Islamic Studies* 25, no. 1 (2022), pp. 22–41.

¹⁶ Ibnu al-Qayyim al-Jauziah, *I'lam al-Muwaqqi'in 'an Rab al-Alamin* (Beirut: Dar al-Kutub al-Ilmiyah, 1993), III: 14.

¹⁷ al-Jauziah, 16.

impose legal sanctions based on prevailing customary considerations. He even rejected customary considerations that were different from local customs,¹⁸ because the law must depart from the reflection of social solidarity in society.¹⁹

The changes in law are a necessity of social phenomena in society.²⁰ This is because organic society gradually experiences changes in the experience of revelation. Especially when developmental solid power values have touched humans. The law becomes an open system to be used as a breakthrough for studies to tolerate other elements outside it by making social changes that occur in society more flexible.²¹

This law change theory illustrates that not every restriction (*had*) written in the Qur'an can be used directly. This means that the type of punishment stipulated in the Qur'an can still be changed into other types of punishment that are adjusted to changes in time, place, and customs, like the law of adultery. The Qur'an stipulates that adulterers *muhshan* punished by stoning to death. This sanction is a sanction determined by adjusting the customs of Arab society when this text was revealed. A judge can give another verdict to the perpetrator of adultery *muhshan* with various considerations. This was once practiced by Umar, who did not cut off the hands of the perpetrators of theft because Umar considered other factors as a judge.

The type of research used in this research is qualitative type with a descriptive analysis approach. Operationally, the authors are directly involved in the field to make observations and collect scientific documents related to this research. Then the author follows the traditional trial with the adultery case in Panyabungan from beginning to end. In addition to this involvement, the author interviewed local traditional leaders, especially those holding positions in traditional

¹⁸ Rizal Darwis, "Pemikiran Ibnu Qayyim Al-Jauziyah Terhadap Paradigma Perubahan Hukum," *Adzkiya: Jurnal Hukum Dan Ekonomi Syariah* 5, no. 1 (2017), pp. 67–86.

¹⁹ Emile Durkheim, *Emile Durkheim on Morality and Society* (University of Chicago Press, 1973), p. 60.

²⁰ Ghofar Shidiq, "Teori Maqashid Al-Syari'ah Dalam Hukum Islam," *Majalah Ilmiah Sultan Agung* 44, no. 118 (2022), pp. 117–30.

²¹ Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge University Press, 2001), p. 166.

institutions.²² After that, the writer mapped the reasons and answers of the informants, which were adjusted to the main problems in this study. To determine informants, the authors look at their competence and involvement in the customary field in the Panyabungan community. After being sorted, all data is verified again to see the level of accuracy of the data. Furthermore, the authors analyze these data with a normative sociological approach and the legal theories that have been described.²³

Customary Law and Sanctions for Adultery in Panyabungan

Criminal acts in the form of religiously prohibited acts (*syara*) always received criticism and threats from Allah, which is referred to as *bad* or *ta'zir*.²⁴ Prohibition (*mabzūrat*) meant is doing something that is prohibited or not doing something that is ordered. In other words, do (*commission*) or did not (*omission*) an act that leads to a punishment determined by Sharia is included as a crime.²⁵

Consequently, the perpetrators of crimes will be punished (*'uqūbah*). Punishment in jurisprudence terms is defined as "retribution that has been set for the violation of orders of *syara*' (Allah and His Messenger) to guarantee the welfare of society."²⁶ This confirms that the sanctions inherent in the syari'a are beneficial in maintaining and anticipating any actions that damage humans so that humans do not go astray too far.²⁷

One form of action categorized as an act of crime in Islamic shari'a is adultery. Islam regards this act as a heinous act (*fahisyah*),

²² Mariko Hirose and John W. Creswell, "Applying Core Quality Criteria of Mixed Methods Research to an Empirical Study," *Journal of Mixed Methods Research*, (2022).

²³ Brynjar Halldorsson et al., "In the Moment Social Experiences and Perceptions of Children with Social Anxiety Disorder: A Qualitative Study," *British Journal of Clinical Psychology* (2022).

²⁴ Ingrid Mattson, *Al-Ahkam Al-Sultaniyyah: The Laws of Islamic Governance*. Translated by Asadullah Yate (London: Ta-Ha Publishers1996), p. 381. See too: *Journal of Law and Religion* 15 (2001), p. 273.

²⁵ Abdul Qadir Audah, *At-Tasyri' al-Jinā'i al-Islāmī* (Beirut: Mu'assasah Al Risālah, 1992), p. 75.

²⁶ Abdul Qadir Audah, *Al-Tasyri' al-Jinā'i al-Islāmī*, p. 166.

²⁷ Restu Ashari Putra, Reza Pahlevi Dalimunthe, and Rizal Abdul Gani, "Konsep Perlindungan Nasab Dalam Perspektif Hukum Islam," *Mutawasith: Jurnal Hukum Islam* 4, no. 1 (2021), p. 39.

because it is a desecration of lineage (*nasab*), which in Islam is highly maintained purity. Adultery is the worst way (*sa'a sabīl*), which opened up opportunities for other embarrassing acts. It destroyed the family's very foundation, resulting in lots of fighting and killing.²⁸ Destroying good names and property and spreading various kinds of physical and spiritual diseases. Given the harmful consequences it causes, it is very reasonable for Allah. Condemn and prohibit the act of adultery.²⁹

Form of prohibition of Allah. About adultery is very strict, as mentioned in His words, which read: "And do not approach adultery; Indeed adultery is an abominable act and a bad way".³⁰

The prohibition contained in this sentence is following *its dilalah 'ibārah/'ibārah an-nash*. It is only a prohibition to approach adultery, not a prohibition against the act of adultery directly.³¹ However, even so, it does not mean that adultery is not prohibited or permissible, because *dilalah an-nash/mafhūm muwāfaqah* the verse in question shows that the law prohibiting "approaching adultery" also applies to "adultery acts" more strongly. This kind of understanding is called "*al-mafhām al-aulawī*".³²

According to the provisions of customary law in force in Panyabungan, if someone already bound in a marriage is proven to have committed adultery (*muhshan*), he will be sentenced to expulsion.³³ The practice of expulsion punishment for adulterers *muhshan* is a custom passed down from generation to generation. The proof of adultery itself can be done in two ways, namely (1) through the confession of the adulterer and (2) through the testimony of other people.³⁴ That is, if the adulterer admits his actions, or there is

²⁸ Muhamad Zainu Nuri, "Penyimpangan Sosial Dalam Surat Al-Humazah", *Pb.D Thesis* (IAIN KUDUS, 2021), p. 21.

²⁹ Muhammad Wiranto and Nasri Akib, "LARANGAN MENDEKATI ZINA DALAM QS AL-ISRA'/17: 32 (ANALISIS KAJIAN TAH\$}\$ LILI)," *EL MAQRA': TAFSIR, HADIS DAN TEOLOGI* 2, no. 1 (2022), pp. 49–50.

³⁰ QS. al-Isra' [17]: 32.

³¹ Desi Asmaret, "Penunjukan Lafazh Terhadap Hukum (Dilalah) Berbentuk Ibarah al-Nash," *Jurnal Al Himayah* 3, no. 1 (2019), p. 100.

³² R. Fakhurrizi, "Jarimah Zina Dan Pemerkosaan Dalam Qanun Jinayat Aceh: Analisis Perumusan Metode Istibath," *Islam Universalia* 1, no. 3 (2020), p. 417.

³³ Sahrul Ramadan, "Kesadaran Hukum Terhadap Larangan Pernikahan Dini," *Jurnal El-Thawalib* 3, no. 2 (2022), p. 262–74.

³⁴ Interview with Martua, as a customary figure, held on 12 July 2022.

testimony from other people that he has committed adultery, the adulteress *muhshan* can be tried in the customary assembly for verification and sentencing by the customary leaders.

The process of resolving adultery cases, both in the case of the perpetrator's confession and in cases of testimony from other people, is resolved through a traditional trial. If the adultery case is the confession of the perpetrator himself. In that case, the perpetrator will convey his confession in the middle of the customary assembly by taking an oath that he has committed adultery. Confession is sufficient even if it is only said once. The customary trial regarding adultery where the perpetrator admitted his actions took place around 2018 ago. In this case, the woman with the initials S admitted that M had impregnated her. Then, the case was resolved in a customary session, and it was proven that S had done it. As a result of these actions, the customary council sentenced both of them to expulsion. However, they were married off first before expelling the two of them.³⁵

While proving adultery through the testimony of other people requires at least two witnesses who witnessed the act of adultery directly. This is not much different from the Islamic legal concept of adultery.³⁶ Witnesses can also corroborate their testimony by showing "dead proof" (in the form of clothing or belongings of the offender found at the scene of the incident) before the customary assembly. To be a witness is not required to be male. The testimony of the two women is valid according to customary law. Mr. Martua Nasution, a member of the traditional assembly in Panyabungan, stated this.³⁷

The process of proving the crime of adultery through testimony, as applicable in Panyabungan, can be inconsistent with the testimony system outlined by Islamic law because, in Islamic law, the number of witnesses in proving adultery cases is at least 4 (four) men. This is explained in Al-Qur'an.

"And against the women who commit indecent acts, bring four witnesses from among you (who witnessed it)..."³⁸

³⁵ Interview with Mursal, as a customary figure, held on 19 July 2022.

³⁶ Muzakir, "Zina Dalam Perspektif Hukum Islam Dan Kitab Undang Undang Hukum Pidana."

³⁷ Interview with Martua, as a customary figure, held on 20 July 2022.

³⁸ QS. al-Nisa [4]: 15.

"And those who accuse good women (of adultery) and they do not bring four witnesses, then beat them (the accuser) eighty times, and do not accept their testimony forever, and they are the people the wicked".³⁹

Even though nominally, it is not in accordance with the rules that have been written on Qur'anic verses, the number of 2 witnesses in the crime of adultery can be sufficient if it refers to customary law.

If adultery is committed by a person who has never been legally married, then in the Panyabungan community, this is known as *manggampang*. The punishment given to adulterers' *ghairu muhsan* is to pay a fine, and then they will be married off.⁴⁰ Whereas adultery is committed by people who have been legally married with their status still having a partner or are already a widower or widow, then it is called *mangalampisi*. The penalty for expulsion from a village is imposed if the person who committed adultery already has a family or has been legally married.

Furthermore, Hanafi explained that the expulsion was carried out to a pair of adulterers, a man or a woman who had been married because the act of dishonor was carried out based on consensual action. The expulsion of a pair of adulterers who have been married must be based on a decision from a customary meeting. Before the customary community decides, the community may not carry out evictions. In this case, the community should not take the law into their own hands. Then, the customary assembly will announce the decision of the customary assembly, namely the expulsion, so that the community knows and monitors that the expelled adulterer is not allowed to return to the village.⁴¹

After the official announcement of the expulsion of the adulterer, every member of the community has the right to prohibit the adulterer's spouse from entering the village area. If the community

³⁹ QS. al-Nur [24]: 4.

⁴⁰ In Islamic criminal law, the punishment for the perpetrators of adultery, *ghairu muhsan*, is flogged one hundred times. It is based on QS. an-Nur [24]: 2. According to Muhammad Syahrur, this one hundred lashes is the maximum that can be given to the perpetrators of adultery, *ghairu muhsan*. See Fuad Mustafid, "Pembaruan Pemikiran Hukum Islam: Studi tentang Teori Hudud Muhamamd Syahrur", *Al-Maḥqabib: Jurnal Perbandingan Hukum* 5, no. 2 (2017), p. 316.

⁴¹ Interview with Hanafi, as a customary figure, held on 4 August 2022.

members in the village saw that the perpetrators had entered the village again, the community would complain about this to the customary leader to take firm action, such as expelling them by force. In this case, the community functions as a supervisor, while the customary leader enforces customary law.

However, this expulsion can end if society accepts them back to live side by side. According to Mr. Rusli's explanation (an elder in a village in the Panyabungan sub-district), perpetrators of adultery are not allowed to enter his village for an unspecified period. Usually, according to Mr. Rusli, the perpetrators of adultery will only be accepted again if it is no longer possible for the conflict to occur in the midst of the community or if the community has forgotten about the adultery case. Mr. Rusli mentioned that in his village, there were perpetrators of adultery who were expelled. After seven years, the adulterer returned to his hometown. Almost no members of the village community object to the presence of the perpetrators of adultery in their village.⁴²

The Purpose of Expulsion for Adulterers: Deterrent Effect and Alternative Sanctions

Every rule of law stipulated is usually inseparable from two factors that influence the emergence of the rule of law. The first factor is the causal factor regarding the reason for the rule of law being enacted, and the second factor is the objective factor to be achieved from establishing the rule of law in question.⁴³ Based on the results of the author's interviews with several informants, two factors led to the enactment of the customary law of expulsion for adulterers *muhshan*, namely the factor of preserving customs that have been passed down from generation to generation and the factor of the conflict between stoning law and positive law in force in Indonesia.

According to information from several customary leaders who were interviewed, the expulsion of adulterers was carried out on the grounds that they followed the habits of previous people who had also applied the same thing. Mr. Rahmat explained that the expulsion penalty for adulterers like this has been in force for a long time, and it

⁴² Interview with Rusli, as a customary figure, held on 25 June 2022.

⁴³ Oemar Moechthar, *Eksistensi, Fungsi, Dan Tujuan Hukum: Dalam Perspektif Teori Dan Filsafat Hukum* (Prenada Media, 2020), p. 35.

is complicated to change it. Because it has become a hereditary tradition among the people. Mr. Sarimuddin also stated the same reason. According to him, the expulsion penalty for adulterers in Panyabungan cannot be ascertained from when it was implemented. The community only follows the customary rules that previous elders have passed down. After all, breaking customs is a bad thing.⁴⁴

According to Mr. Mursal, the expulsion provisions for adulterers have long been in force in the Panyabungan sub-district. He explained that the expulsion punishment was a customary rule passed down from previous parents for generations. It cannot be known when it was first implemented and who was the originator. Regarding the provisions in detail, usually, only traditional leaders know better.⁴⁵

Based on the explanation of some of the information above, the eviction law has been in effect for a long time, and the time cannot be predicted. Based on Sarimuddin's statement, adultery can be said to be a violation of customary law. That is, in addition to the norms of Islamic law, adulterers have also violated customary norms. Thus, the punishment also follows the customary norms that apply.

The factors that caused the emergence of customary rules regarding expulsion punishment like this are that the punishment for adultery, as prescribed by Islam, is impossible to apply in this village. Because the law that applies in our own country is not Islamic law. Therefore, punishment in Islam is replaced by customary punishment. Mr. Kholid stated this.⁴⁶ Observing this statement means there are efforts for indigenous peoples to preserve Islamic law in addition to the enactment of Indonesian positive law.

Punishment *stoning* undoubtedly contrary to the positive law, which applies the death penalty only to a few extraordinary cases. In this way, indigenous peoples take a middle ground between Islamic law and positive law by preserving the existing customary law, namely expulsion.

The good aim of implementing expulsion punishment is to provide a deterrent effect and preventive measures. As explained by Mr. Rusli, this punishment is expected to deter the perpetrator so that

⁴⁴ Interview with Sarimuddin, as a customary figure, held on 5 August 2022.

⁴⁵ Interview with Mursal, as a customary figure, held on 30 June 2022.

⁴⁶ Interview with Kholid, as a customary figure, held on 5 August 2022.

he does not repeat the same mistake next time. In addition, the punishment also serves as a preventive measure for the broader community so that they distance themselves from committing adultery.⁴⁷

Mr. Sati expressed a similar goal in implementing the expulsion penalty; according to him, the expulsion sentence was hoped to reduce cases of adultery in this village, even though proven cases of adultery were rare. The application of expulsion punishment also purposes as a means to cleanse the village of all immorality, because the act of adultery is a dirty act that defames this village.⁴⁸

The reason for applying expulsion punishment for adultery perpetrators on the basis of following the custom as described above is legally justifiable. Because in the rules of Islamic law, custom can be used as a basis for considering legal provisions. Fiqh rules mention *al-adah muhakkamah*.⁴⁹ This rule explains that good habits/traditions can be made as basis of law if they do not conflict with religious norms. These traditions/customs can be said to be Islamic law, even though they are not written in the texts but only refer to the prevailing local traditions.

In the history of the formation of Islamic law itself, there were several customs of the Arab people before Islam that were absorbed into Islamic law. An example is a legal provision *diyat* that must be paid by the perpetrator of the murder to the family of the murdered. This law was valid among the Arab community before Islam came.⁵⁰ Legal provisions of *diyat* is continue to be enforced until it is determined to be part of Islamic law. Ultimately, this punishment becomes the standard punishment specified in the text about *diyat* for the killers. Not all customs can be used as the basis for legal determination because the custom some are good (*shahih*), some are invalid (*fasiid*).⁵¹ The

⁴⁷ Interview with Rusli, as a customary figure, held on 10 August 2022.

⁴⁸ Interview with Sati, as a customary figure, held on 20 August 2022.

⁴⁹ Fahmi Fatwa Rosyadi Satria Hamdani et al., "Traditional Law vs. Islamic Law; An Analysis of Muslim Community Awareness in Inheritance Issues," *Al-Ahkam* 32, no. 1 (2022), p. 128.

⁵⁰ Devi Nilam Sari, "Implementasi Hukuman Qisas Sebagai Tujuan Hukum Dalam Al-Qur'an," *Muslim Heritage* 5, no. 2 (2020), p. 265.

⁵¹ Tomi Adam Gegana and Abdul Qodir Zaelani, "Pandangan Urf Terhadap Tradisi Mitu Dalam Pesta Pernikahan Adat Batak," *El-Izdiwaj: Indonesian Journal of Civil and Islamic Family Law* 3, no. 1 (2022), pp. 18–32.

customs that can be used as the basis for determining the law are good customs (*shahih*). For this reason, the exorcism position for adulterers needs to be clarified in advance whether this custom is considered a good one (*shahih*) or invalid customs (*fasid*) so that it can be known whether it can be applied.⁵²

Then, when viewed from the reason for the emergence of the customary law, it can be understood that the people in Panyabungan did not intend to oppose standard rules in Islam, especially those relating to the problem of punishment for adultery. The expulsion penalty was applied as proof of public concern in overcoming the problem of adultery because Islamic law is impossible to apply in that area. In addition, their goal in establishing these rules has referred to the purpose of implementing Islamic law, namely for the benefit.⁵³ In this case, welfare is related to efforts to keep the community away from committing adultery so that the sanctity of the lineage (lineage) can be well preserved.⁵⁴

Expulsion Punishment for Adulterers from the Perspective of *Al-'Adah Muhakkamah* Theory

The benefit of the community as the goal of implementing the expulsion penalty for adulterers is indeed good according to reason and in line with the objectives of Islamic law.⁵⁵ However, the benefit in this case may not necessarily be justified because *syara'* has stipulated a law different from what this benefit requires. *Syara'* has stipulated specific punishments for the perpetrators of adultery, namely flogging and exile for the perpetrators of adultery *ghairu muhsan* along with stoning for adultery *muhsan*, not expulsion punishment. Thus, the benefit, in this case, is the benefit that is not seen by *syara'* (*masalah mulghah*).⁵⁶

If applying expulsion punishment for adultery *muhsan* is a good custom, and it can be justified as a substitute punishment based

⁵² Khairil Azmi Nasution, "Traditional Existence in Islamic Law," *Journal Law Islamic Maqashid Al-Ahkam* 1, no. 01 (2022), p. 28.

⁵³ Shidiq, "Teori Maqashid Al-Syari'ah Dalam Hukum Islam."

⁵⁴ Muhammad Alfath Akbar, "MAQOSHID AS-SYARIAH TERKAIT HUKUM KELUARGA," *AL-RISALAH* 17, no. 1 (2022), pp. 23–32.

⁵⁵ Marli Candra and Nanda Pricilia Nadhiva, "Tinjauan Filsafat Hukuman Dalam Islam Terhadap Overspel Dan Zina," *Al-Jinayah: Jurnal Hukum Pidana Islam* 6, no. 2 (2020), pp. 450–76.

⁵⁶ Hamzah Kamma, "Urgensi Masalah Dalam Pembaruan Hukum Islam Di Era Global," *Al-Manahij: Jurnal Kajian Hukum Islam* 8, no. 2 (2014), pp. 217–32.

on the prevailing Islamic legal theories, then customary provisions in Panyabungan village are not a problem to apply. However, if the facts show otherwise, then customary law provisions like this are inappropriate to enforce. For this reason, the author will analyze this problem further in the following discussion.⁵⁷

The legal verdict carried out by the indigenous people in Panyabungan is also related to punishment *ta'zīr* (*'uqūbah ta'zīr*). What is meant by punishment *ta'zīr* is "an educational punishment that is handed down based on the discretion of the judge as a reward for the person who commits an illegal act so that he does not repeat the act and (his act) is not subject to *bad*, *qishash* or atonement."⁵⁸

Based on the definition above, it can be understood that punishment *ta'zīr* is another form of punishment, *hudūd*, *qishash*, and *kafarat*, imposed on the perpetrators of certain crimes, whether it concerns God's rights or people's rights. Regarding the form, type, and amount of punishment *ta'zīr*, *syara'* does not determine the provisions. To determine punishment *ta'zīr*, *syara'* leave it to the judge's discretion by taking into account the benefit of the convict, the surrounding environment, and the goals to be achieved in carrying out the sentence. Besides, punishment *ta'zīr* can be contrary to the general text that occurs in Islamic shari'a.⁵⁹

All kinds of punishment *ta'zīr* can be classified into four varieties, namely: (1) physical *ta'zīr* (*'uqūbah badaniyyah*), (2) *ta'zīr* related to the restriction of freedom of action (*tabdīd al-hurriyyah*), (3) *ta'zīr* of a financial nature (*'uqūbah māliyyah*), and (4) *ta'zīr* psychic (*'uqūbah nafsīyyah*).⁶⁰

Ta'zīr of a physical nature, such as the death penalty and flogging. *Ta'zīr* related restrictions on freedom of action, such as prison and isolation sentences. This includes a variety of *ta'zīr* financial factors, including confiscation, fines cost (*gharamah*), and destruction. In

⁵⁷ Dedi Sumanto, "Hukum Adat Di Indonesia Perspektif Sosiologi Dan Antropologi Hukum Islam," *JURIS (Jurnal Ilmiah Syariah)* 17, no. 2 (2018), pp. 181–91.

⁵⁸ Hadfmand Nabipor and Hedayt Allah, "Shari'ah Ta'zir from the Point of View of Jurisprudence and Its Difference with Legal Ta'zir," (2020), p. 133.

⁵⁹ Mohammad Reza Mousavifard and Hadis Zofaghari, "Philosophy of Ta'zir Punishment from the Perspective of Criminal Law and Islamic Criminology," (2021), p. 129.

⁶⁰ Ahmad Wardi Muslich, *Hukum Pidana Islam* (Sinar Grafika, 2005), p. 258.

addition to the three varieties of *ta'zīr* above, variations of *ta'zīr* seem more physical, including advice, warnings, condemnation and reproach, defamation, dismissal, and revocation of civil and political rights.⁶¹

By explaining the forms of punishment according to *syara'* and the parts described above, it can be concluded that expulsion/exile is included in the form of punishment *ta'zīr*. This means that expulsion penalties can also be imposed on perpetrators of criminal acts *budūd* in the education category because punishment has become a tradition. This tradition changes the punishment of stoning to a punishment of expulsion because there is a strong reason for the change. According to the positive law in Indonesia, the death penalty (*stoning*) can only be done in some cases of extraordinary *crime*. This follows the rules Ibn Qoyyim mentioned: the law could change according to time, place, and tradition. Regarding time and place, indigenous peoples cannot carry out stoning, so the punishment turns into expulsion. Even though the form of punishment has changed, the spirit of the purpose of the law remains the same, namely to provide a deterrent effect and prevent other people from doing the same thing.

According to information from the Panyabungan community, as described in the previous discussion, this expulsion penalty was applied because it followed customary law provisions that had long been in effect and passed down from generation to generation. In addition, this expulsion punishment is a substitute for punishment *had* which has been established in Islamic criminal law based on the ability to replace the death penalty with punishment *diyat*.⁶² Based on this, the reasons or arguments used by the community in determining expulsion penalties for adulterers are based on custom and the theory of changing laws based on time and place.

⁶¹ A. F. Bahnasi, "Al-Uqubah Fi al-Fiqh al-Islami,[Punishment in Islamic Jurisprudence]," (Cairo: Dar al-Shorouq, 1989), p. 215.

⁶² Dedy Sumardi, Ratno Lukito, and Moch Nur Ichwan, "Legal Pluralism within the Space of Sharia: Interlegality of Criminal Law Traditions in Aceh, Indonesia," *Samarab: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 1 (2021), pp. 426–49.

Conclusions

Provisions on the expulsion penalty for married adulterers (adultery *muhshan*) applied in Panyabungan is a customary punishment passed down from generation to generation. This expulsion penalty is imposed if the perpetrator of adultery is a person who is already bound by a marriage. The proof is carried out by showing authentic physical evidence and also the presence of two trusted witnesses. Before sentencing the perpetrators of adultery *muhshan*, procedurally, customary leaders in customary institution consult beforehand to determine whether the expulsion sentence is appropriate by considering the evidence and witnesses in the customary trial. There are two reasons for applying expulsion laws for adulterers *muhshan*: first, because it follows customs that have been in effect for a long time; and second, it is not possible to apply stoning law in the Republic of Indonesia. The purpose of the expulsion punishment is to give a deterrent effect to the perpetrators of adultery and as a preventive measure for the community not to commit adultery. Apart from that, the expulsion law for *muhshan* adulterers is one of the ways to clear the name of the village. Applying expulsion punishment for adulterers *muhshan* as applicable in the Panyabungan community is customary law, which appropriate with the purpose of Islamic law.

Conflicts of Interest

The author has no conflict of interest with any party in writing this article.

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