

**INDONESIAN WOMEN'S COALITION
ANSWERING QUESTIONS FROM PANEL OF JUDGES OF
THE CONSTITUTIONAL COURT**

**AS INDIRECT RELATED PARTY IN CASE
No. 46/PUU-XIV/2016**

22 SEPTEMBER 2016

INDONESIAN WOMEN'S COALITION

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INDONESIAN WOMEN'S COALITION'S ANSWERS TO
THE QUESTIONS OF PANEL OF JUDGES OF THE CONSTITUTIONAL COURT
IN THE 8TH TRIAL OF CASE 46/PUU-XIV/2016

ON 8 SEPTEMBER 2016

The Honorable Panel of Judges of the Constitutional Court,

With all due respect to representatives of the Government and
the People's House of Representatives

With all due respect to the Applicant and the Related Party.

Assalamualaikum wr. wb. Good afternoon, best wishes to us all.

At the previous trial, 8 September 2016, Indonesian Women's
Coalition, as the Indirect Related Party, have presented
Women's Daily Experiences as response to the applicant's
application case 46/PUU-XIV/2016, with the hope that the
experiences can be used as consideration for the Panel of
Judges in deciding the case, as requested by the Applicant.

To avoid any error in writing of questions asked by the Panel
of Judges, Indonesian Women's Coalition present the answers to
the questions, as written in Minutes of Trial Case Number:
46/PUU-XIV/2016 in Trial Proceedings hearing explanation of
the Women's Coalition Related Party, Yayasan Peduli Sahabat
dan Persatuan Islam Istri, the 8th trial, on 8 September 2016.

The Honorable Panel of Judges of the Constitutional Court,

The following is the answer to the question of Judge of the Constitutional Court Mister Patrialis Akbar:

1. Actually which is feared more, imprisonment in this transitory world because there are no norms, or with eternal big sin which will have consequences on the judgment day, all religions must speak like that.

I juts want to know, which is more feared or which is more liked? This is a matter of criminalization and sin.

Indonesian Women's Coalition's answer is as follows:

Regarding which is more feared between legal norms and religious norms, we cannot simply choose one of the two.

A law and imprisonment can be feared or have power, if from the aspect of legal substance, legal structure and culture, the law can perform well, meet the people's conception of justice and provide legal certainty.

Legal substance, or how law is formulated, normative and substantial reasons behind law formula are determined tyo regulate someone's behavior in community, and to meet conception of justice of the parties and the people. This legal substance will be highly decisive in whteher or not a law and punishment for it's breach, can be performed. Legal structure, namely institutions and individuals in such institutions, functions to guarantee implementation of legal substance and upholding of law against breach of legal

substance, while legal culture is atmosphere of social thinking and social strength and which determines how a law is used, implemented, avoided, or abused. Legal culture is closely related with people's acceptance or rejection of law.

The three parts of this legal system are interrelated, have causal relation, determine law authority.

Good legal substance is based on good reasons, norms and objectives, does not guarantee that such law will have authority or be feared, if the legal structure does not perform properly and the legal culture does not support the implementation of the legal substance. One of the realest examples of this matter is Law on narcotics and Law on Eradication of Corruption. Substantially, this law has clear elements of criminal cases, as well as provides for very express threat of criminal punishment. Even Law on narcotics provides for death penalty. Nevertheles, both laws do not cause enough fear to a person to not commit the crime. This is proven with the fact that there are still many cases of corruption and narcotics trade.

The many cases of narcotic and corruption crimes cannot be separated from the situation of legal structure which does not support the implementation and upholding of law, as well as lack of legal obedience among the people to report such crimes. However, at the same time, both laws are used for the

interest of the informers, such as competition in narcotics trade or due to political competition.

From narcotics and corruption crime cases, we get a good knowledge, that imprisonment threat is not effective to cause fear to someone to not commit a violation of a legal stipulations punishable by imprisonment.

Religious norms have determined good deeds and bad deeds, allowed (*halal*) things or forbidden (*haram*) things, sinful or virtuous deeds. However a person's obedience to the religious norms is not only determined by textual stipulation of the religious norms.

Exemplary behavior of religious leaders will significantly determine obedience of religious community to religious stipulations. Religious teachings given to their community will also significantly determine obedience and piety of their community, either in the form of social piety or personal piety. If religious teachings given to the community are limited to symbols, rituals and religious history without in-depth explanation about the essence of faith and the nature of human beings before God and within society, the community's piety will not be formed, so that people no longer fear sins.

The questions now are: How do religious leaders carry out their leadership function and how are religious teachings given to their communities? Why are personal piety and social

piety not formed in some members of the communities. This certainly must be used for reflection by religious leaders.

Have religions actually failed in forming personal piety and social piety that it is necessary to use state criminal law to spread the fear, and force people to obey religious rules? We hope not. We still believe that religions can still carry out their function in forming people's personal piety and social piety.

2. Second, **actually from your explanation, do you object adultery itself?** Yes, either like the current formula or the formula proposed by the Applicant. Or do you actually object the change of the offense category? From previously crime by accusation to general crime. Which one do you object? Is it the adultery or the change of the offense category? You said that there will be many interventions by the government to personal matters.

Indonesian Women's Coalition's answer:

Indonesian Women's Coalition object the formula proposed by the applicant and the change of category of offense proposed by the applicant through omission of the paragraphs in Article 284 of the Criminal Code (KUHP) which provide for crime by accusation, because it will be detrimental to women and families.

3. Third, considering the extraordinary nature of the three deeds questioned by the Applicants, that is show by

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facts, and are not made up, and even now child prostitution is extraordinary. I would like to ask you, which one is better, there are norms which prohibit adultery in all perspectives or there are no norms that it is easy for people to commit those violations?

Indonesian Women's Coalition's answer

As stated in the previous explanation, Indonesian Women's Coalition said that many cases of adultery, rape and pornographic action are undeniable fact.

Therefore, various parties namely the government and the people make various attempts to deal with this problem.

We agree that children must be protected from all kinds of sexual violence, with or without their approval, all perpetrators of child sexual violence must be punished.

The government and the People's House of Representatives have also made various policies and programs among others: amending twice law on child protection, ratifying Optional Protocol To The Convention On The Rights Of The Child On The Sale Of Children, Child Prostitution And Child Pornography, preparing national action plan of elimination of child sexual exploitation, organizing child violence elimination programs.

Which one is better, there are norms which prohibit adultery in all perspectives or there are no norms that it is easy for people to commit those violations?

Indonesian Women's Coalition's answer:

Indonesian Women's Coalition believe that religious norms have prohibited adultery. Religious norms are actually enough to prevent people from committing deeds that are prohibited by religions, if religious teachings are actually given with the purpose to minimize all bad deeds, including adultery and pornography, as well as there are good examples set by religious leaders to not commit bad deeds, so that the people are obedient to their religious norms because their understanding and because of the teachings and good examples that they receive and feel as religious communities and not because they are afraid of imprisonment.

In addition to religious norms, in Indonesia there are also social norms which prohibit adultery, rape and pornographic actions. If all the people and leaders in the community have concern, then social order will be established.

More than that, we would like to add that disagreement of Indonesian Women's Coalition with the proposal of the change of Formula of the Criminal Code does not mean that we agree to adultery, pornography and rape. Rather it is because we see potential big disadvantage to be suffered by women and families,

Families will lose authority in determining their best options to maintain the wholeness of family and carry out their function as family. Female rape victims will suffer the burden

of being victims twice as much because law of procedure which is not on their favor is highly likely to cause the victims to fail to prove the rape, and then they will be criminalized as perpetrators of pornication.

4. Fourth, is there any research by Women's Coalition on how miserable wives are who get incurable disease because their husbands constantly commit adultery? Is there any research on how miserable women are who suffer such disease?

Indonesian Women's Coalition's answer

The Honorable Judges, Indonesian Women's Coalition have never conducted any research about a woman who gets sexually transmitted disease from her husband.

However, since 2011 Indonesian Women's Coalition have found cases of wives who are exposed to HIV-AIDS and fight to live ensure that their children can live properly when they die of the disease.

Indonesian Women's Coalition also monitor the development of new cases of housewives who are infected with HIV-AIDS from their husband, since 2009 until now.

The number of new cases of HIV-AIDS in housewives keeps increasing. In 2009 there were 264 new cases, in 2010 there were 674 new cases, in 2011 there were 622 new cases. Until the end of 2014 the cumulative number of housewives who are

infected with HIV in 2014 is 10.626, the highest compared with all other profession groups: non-PNS (public servant) employees (5.638), PNS (1.658) and even compared with sexual workers namely 2.025, while actually this group is always labeled as high risk group.

Nevertheless, to criminalize a husband who commits adultery and even if he passes HIV-AIDS to his wife, is not a proper way to deal with this problem.

In December 2012, Indonesian Women's Coalition have expressed an idea that legal approach is made to husbands who pass HIV to their wives. However, rejection actually came from most of the wives who are infected with HIV, because for them, criminalization of their husbands will not bring back their health, and it will even worsen their lives while they are fighting to stay alive.

5. The question, what if the husbands have already been advised repeatedly, brought to religious teacher to receive sermon, but because there are no norms which prohibit them from doing it, they keep doing it?

Indonesian Women's Coalition's answer

Every family have their own way to deal with their problems, in order to guarantee the continuance of their family life.

If even after being advised the husbands still commit adultery, commonly the wives will ask the husbands' families

to advise them. If the husbands also ignore the advice from their families, the wives will report to the husbands' employers. If the employers do not care about the husbands' behavior, the wives will ask for separation. Next, if no positive change is made even during the separation, the wives will take civil legal action to settle their marriage relationship.

The civil law procedure, such as divorce, is preferred by the wives, because by using this channel, they can still demand their ex husbands to be responsible for basic necessities of life their children and ex wives, as long as they are not remarried.

The children will not see their father labeled by the state and the community as a criminal so that the relation between the children and their father will still continue although not as good as that when the fathers have not yet committed fornication.

6. Then you said that adultery causes sin. Do we not pity them that the wives or their husbands are sinned of fornication?

Indonesian Women's Coalition's answer

Of course we have pity on women who become victims of unfair action (fornication) done by their husbands. However all women movements and we have values in providing advocacy, namely advocacy from perspective of the victims, namely views and

actions based on a belief that it is the victims who suffer the most and it is also the victims who will bear the risks of their choices of settlement of their problems. Therefore, it is only the victims who have the right to determine the best choice that they can apply.

We all should realize that we do not have the right to determine settlement options of the problems faced by the victims even if it for a reason of pity because what is good according to us all is not necessarily good for the victims and threir families. Thus, let the victims decide the best option for themselves and their families

In some cases we found that families who force members of their families who are married to men who are adulterers to divorce the husbands or report them to the police, but it ended up with the divorced wives and heir children facing various economic and social problems, while those who have forced the wives to divorce hteir husbands or report them to the police did not take any responsibility for the consequences of their advice experienced by the divorcee wives and their children.

the Honorable Panel of Judges

based on the above reasons, Indonesian Women's Coalition request the Constitutional Court to hold to reject the applicant's request.

7. I heard you said something about sin. And then how the parents are asked to be able to look after their children properly. Very good, it's a part of education which is expected from their position as parents. The person from Persis said, "a child's piety depends on his or her parents' piety." How can parents look after their children properly when both of them are terrible adulterers? How do we educate our children properly? What is the qualifications of proper education of children?

Indonesian Women's Coalition's answer

Education, care and protection are the three main factors which contribute in establishment of a child's character while he or she grows and develops. A child education and care are the main responsibility of parents. However besides parents, families, community, education institutions, the government and the state also bear the responsibility for child education and protection. Children do not only obtain knowledge about values and attitudes from their parents. However, the circle of, school, peer interaction, community and media also contribute in establishing character, attitude and behavior of children.

Children of good parents may grow into bad adults because families, school, peer interaction, community, the government, the state and media give bad influence. In contrast, children of bad parents may grow and develop into good adults because

families, school peers, community, the government, the state and media give good influence on their growth and development.

Most of the people who become terrorists, thieves, corruptors, adulterers, drug addicts and even murderers did not grow under care of parents who are terrorists, corruptors, adulterers, drug addicts or murderers.

Factors outside parents have influence on the children and make them what they are.

In contrast, children and people who grew under care of parents who are corruptors, thieves, adulterers, drunks, murderers can grow into good, honest, pious and wise people stay away from the bad deeds once committed by their parents, due to factors outside care of their parents who contribute to the establishment of their character and attitude.

The proverb "the apple does not fall far from the tree" or "like father like son" are commonly used with either good or bad connotation, and can cause either good or bad.

Children who grow and develop under care of good parents, this has good meaning and give good impact on children or their parents because it grows pride and confidence.

However if the proverb is used for children who have parents who are not good or less good it becomes statement which is "judgmental" to the children, even when they have not done any mistake at all. These children are labeled bad for something

they have not even done yet, but already done by their parents, and even they do not agree to what their parents did.

8. And then if the wives have already stated their objection repeatedly to their husbands so that they would stop committing adultery with other women, stop raping other people, stop committing homosexual pornography, but the husbands refuse to stop, how do we uphold justice for the wives?

Indonesian Women's Coalition's answer

The Honorable Panel of Judges,

Regarding this question we separate between rape committed by the husbands, and adultery and homosexual pornography committed by the husbands because rape is a general crime, while adultery and pornography (without force) is a crime by accusation. In many cases, wives whose objection is ignored by their husbands are commonly violence victims.

a. If a husband raped another person, or even raped his own daughter, or committed homosexual pornography to a child or person in his family, the wife needs to be strengthened in order for her to report the crime to the police. If after the strengthening the wife is still scared to report the crime, then advocacy provider or the surrounding community or the family of the victim are strengthened to report the crime. If in the area there is P2TP2A (Integrated Service Center for Women's Empowerment

and Child Protection), then this institution has the obligation to report the crime to the police.

P2TP2A or women organization or advocacy organization, also have the obligation to report victims of violence (including their families and wives of perpetrators) to office of social affairs, so that office of social affairs carry out their obligation to provide rehabilitation and social reintegration service, including economic empowerment for the victims and their families, as provided for in regional laws and regulations

b. If a husband continues to commit adultery with other person or commit homosexual pornography (with adults and without force/violence/violence threat), whereas his wife has expressed her objection to him, then women organizations, advocacy organizations or P2TP2A will do the folllowings:

- 1) Strengthening the wife mentally and providing knowledge about her rights and the laws that protect her so that she can make choices for herself and her family, as well as building a support system from family and community.
- 2) Providing as much opportunity as possible for the victims to learn about legal actions that they can

take and the consequences that will arise from the selection of the legal actions.

- 3) If the wife's request for a mediation and legal advice, then women's organizations, advocacy organizations or P2TP2A summon her husband and perform mediation as well as provide information about legal rules governing the actions taken by the husband. If an agreement is reached from the mediation process that the husband would not repeat his actions, then women's organizations, advocacy organizations or P2TP2A participate in monitoring the implementation of the agreement.
- 4) If after the agreement, the wife reports that her husband repeated his action, then advocacy is performed again. If she intends to report her husband to the police or asks for divorce, then the advocate provides support of the victim's choice. If the victim still cannot make a decision, then the advocate has the obligation to wait until the victim make her decision, and to prevent a worse condition from occurring (trauma, children not attending school, inability to meet the needs for food and other basic needs).
- 5) If during this process he husband makes a threat of violence or commits violence to the wife, the

advocate reports to the police, to deal with the violence problem and report to the office of social affairs in order for the victim to get rehabilitation services and social reintegration as well as place the victim in a safe house managed by the office of social affairs or managed by the community, if needed.

9. And then, if I heard you correctly, you actually agree with the current Draft Criminal Code. The Draft Criminal Code in the House of Representatives. I would like to inform you a part of the Draft Criminal Code that is submitted the House of Representatives, among others, the underlying points, among other things from me as then Minister of Law and Human Rights and Mr. Wahiduddin Adams currently Judge of the Constitutional Court as the director general of law and human rights ... director general of legislation who, among others, in the formulation actually intends to change the adultery clause as requested by the applicants. How can you state that you agree with that concept?

Indonesian Women's Coalition's answer

The Honorable Panel of Judges of the Constitutional Court

The Draft Criminal Code submitted by the President of the Republic of Indonesia to the Chairman of the House of

Representatives of the Republic of Indonesia, dated 5 June 2015, Letter No. R-35/Pres/6/2016, Re: Draft Criminal Code.

In the Second Book on Crime, Chapter XVI on Moral Crime, Part Four on Adultery and Pornographic Actions.

- **Adultery**

Adultery is provided for in Article 484 of the Draft Criminal Code, stated as follows:

- (1) Sentenced for adultery, with a maximum imprisonment of five (5) years:
 - a. married man who has sexual intercourse with a woman who is not his wife.
 - b. married woman who has sexual intercourse with a man who is not her husband.
 - c. unmarried man who has sexual intercourse with a woman who is known to be married with another man.
 - d. unmarried woman who has sexual intercourse with a man who is known to be married with another woman,
or
 - e. unmarried man and unmarried woman who have sexual intercourse with each other.
- (2) Crime referred to in paragraph (1) is not subject to prosecution unless based on a complaint from the husband, the wife or defamed third party.

(3) The complaint referred to in paragraph (2) shall not be subject to the provisions of Article 26, Article 27 and Article 29.

(4) The complaint may be withdrawn as long as the examination in court has not yet begun.

It is true that Article 484 of the Draft Criminal Code has undergone from article 284 of the Criminal Code, namely addition of point e in paragraph (1) namely adultery by unmarried men and unmarried women who have sexual intercourse with each other and addition of the parties who can file charge, namely: defamed third party;

The Draft Criminal Code including article 484, is now still under discussion of the House of Representatives. A number of legal experts and community who are concerned with the Draft Criminal Code have also observed and examined: 1) whether the articles formulated in the Draft Criminal Code are in accordance with: principles of the Criminal Law, consistent with the legal foundations of the Criminal Law, as formulated in the draft, 2) whether the legal structure and legal culture makes it possible to enforce the substance of the Draft Criminal Code, including Article 484 of the Draft Criminal Code, 3) whether upholding of law will be have positive impact or even a negative impact on public order, 4) whether there is a balance between the cost to be incurred and benefits to be gained.

Moreover, the discussion of Article 484 of the Draft Criminal Code also includes: 1) whether it is proper or not to include moral crime into the offenses that are deemed "serious" namely offenses which basically should be punishable with imprisonment of more than 1 (one) year until 7 (seven) years, and 2) clarity about who to file charge, including preventing the misuse of the formulation of the term defamed third party.

- **Sexual Abuse and Rape**

Criminal stipulations concerning sexual abuse are provided for in Part Five regarding rape and sexual abuse, especially in Paragraph Two, article about sexual abuse, Article 492 until Article 500, Article regarding rape and homosexual sexual abuse are provided as follows:

Article 491 of the Draft Criminal Code

- (1) Punished for crime of rape with imprisonment of a minimum of 3 (three) years and a maximum of twelve (12) years:
 - a. a man who has sexual intercourse with a women outside marriage against her will;
 - b. a man who has sexual intercourse with a woman outside of marriage, without her approval;
 - c. a man who has sexual intercourse with a woman with her approval because she believes that he is her lawful husband.

- d. a man who has sexual intercourse with a woman aged under 18 (eighteen) years with her approval, or
 - e. a man who has sexual intercourse with a woman when it is known that she is unconscious or helpless.
- (2) Also deemed to have committed crime of rape, if the circumstances referred to in paragraph (1):
- a. a man who puts his penis into the anus or mouth of a woman, or
 - b. a man who inserts an object that is a body part into the vagina or anus of a woman
- (3) If any of the criminal offenses referred to in Article 491 results in serious injury or death of a person the offender shall be punished with imprisonment of minimally 3 (three) years and maximally 15 (fifteen) years.

New formulation of crime of rape has both its progresses and weaknesses.

1. The progress of formulation of the Draft Criminal Code is the diversity of ways to achieve the objective of crime of rape and various forms of rape which are not limited to just sexual intercourse.
2. The weaknesses of the formula of the Draft Criminal Code are:

- a. limiting to only perpetrators and victims, namely the perpetrators are male and the victims are female.
- b. not distinguishing between gang rape and rape committed by a single person.
- c. not specifically regulating cases when the victim is a disabled person, with a diversity of disabilities
- d. not regulation special law of procedure that is more victim friendly, especially in the context of burden of proof, witnesses and evidence.

While sexual abuse to adults and children is stipulated in Article 492 and Article 495 of the Draft Criminal Code draft KHUP as follows:

Article 492

Any person who by violence or threat of violence forces a person or let a pornographic action committed to him, shall be punished for act that violates morality, with a maximum imprisonment of 9 (nine) years.

Article 495

- (1) A person who commits a pornographic action with another person of the same sex who is known or ought to be known to be under 18 (eighteen) years old shall be punished with imprisonment of 9 (nine) years.

- (2) Punishable with the punishment and added with one-thirds of the punishment if the pornographic action referred to in paragraph (1) is committed by way of oral sex or anal sex or any other form of contact of non-genital organ with genitals done homosexually.

Notwithstanding imperfection of the articles in the Draft Criminal Code regarding adultery, rape and sexual abuse, the fact remains that those articles are still under discussion in the Parliament with various concerned parties.

The decision of the Constitutional Court is final and binding. If the Constitutional Court decide to accept the request of the applicant namely by amending article 284 of the Criminal Code, Article 285 of the Criminal Code and Article 292 of the Criminal Code, then the Constitutional Court's decision will have an impact of ending the opportunity to renew the formulation of the Draft Criminal Code (especially the article about adultery, rape and sexual abuse) in accordance with the development of crimes the community's conception of justice.

Therefore, Indonesian Women's Coalition request the Constitutional Court to reject the request of the applicant, in order to open the opportunity for legal reform through legislative process.

10. The final question is incase of bisexual relationship by a man, he performs sexual intercourse with his wife and also commits sexual abuse with other parties. It is

related with education which destroys families that you have said previously. If a husband has such bisexual relationship, according to you will it destroy the family or make family life more comfortable?

Indonesian Women's Coalition's answer

The Honorable Judges,

The presence of a third party in a marriage relationship always causes discomfort regardless the third party is the opposite sex or the same sex. The presence of such third party (same or opposite sex) eliminates the values of marriage, as stated in the Marriage Law, that

"Marriage is the emotional and physical bond between a man and a woman as husband and wife with the intention of forming a happy and lasting family (household) under the only one God "

Therefore, the state, through legislation gives options to a wife to resolve her problem. A wife in choosing legal options, either criminal or civil law, or using a mechanism outside law, one of which is mediation.

If a wife chooses to use the criminal law, then she can use Article 284 of the Criminal Code, reports to the police, because her husband committed overspel (sexual intercourse outside of marriage). This article can be used to use a husband who committed overspel with same-sex or opposite sex,

because the article does not regulate the sex of the parties involved in the *overspel*.

If a wife chooses to use the civil law, then she can use Law No. 1 of 1974 and Government Regulation No. 9 of 1975.

If a wife chooses mediation to settle her problem, she can ask for assistance to Legal Aid or the parties trusted by her to perform mediation and negotiation.

We gave the answers with the hope that they will be useful for decision-making of the Constitutional Court in the Judicial Review of the Criminal Code, Article 284, Article 285 and Article 292, against the 1945 Constitution of the Republic of Indonesia (UUD 1945) in the Case Number 46/PUU-XIV/2016.

Thank you for your attention.

Jakarta, 22 September 2016

Dian Kartikasari

Secretary General

I, **Anang Fahkrudin**, residing at Jl. Kalibata Timur Raya No. 12, Kel. Kalibata. Kec. Pancoran, South Jakarta, (anangf@cbn.net.id), a sworn and authorized translator, by virtue of Jakarta Capital Territory Governor's Decree No. **2228/2001**, practicing in Jakarta, do solemnly and sincerely declare that the foregoing document is a true and faithful translation from Indonesian into English of the original version.

Jakarta, October 21, 2016

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