



The Urgency of Abolishing the Death Penalty on Sexual Crimes According to Islamic Law and the Perspective of Pancasila

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Abstract. The death penalty against perpetrators of sexual crimes according to Perppu No. 1 of 2016 can be applied if the victim is caused by more than one person, the victim is seriously injured, has a mental disorder, suffers from an infectious disease, damaged reproductive functions until the victim dies. In addition, in imposing punishment for perpetrators of sexual crimes, it is aggravating because the victims are children. This study aims to examine alternatives to punishment other than the death penalty for perpetrators of sexual violence. This study uses a normative method with a statutory approach and examines various regulations regarding the death penalty. The death penalty is considered no longer effective, even some countries have abolished the death penalty and there is no evidence that the implementation of the death penalty has reduced crimes. The death penalty is not in accordance with the purpose of punishment, namely to improve the perpetrators themselves because they are considered lost and sick people so that they need to be treated in order to recover. In Islamic law, the perpetrators of sexual crimes are equated with adultery, but if accompanied by violence, only the perpetrators are sanctioned in the form of stoning if they are married, but if they are still single, they are only punished with whipping. However, through the process of at least four male witnesses who have been sworn in and confessions from the perpetrators of sexual crimes. Perpetrators of sexual crimes should only be imprisoned for life as a middle way that is taken so that it does not conflict with international regulations and in accordance with the punishment in the RUU-KUHP. This research can contribute to efforts to reformulate the death penalty for perpetrators of sexual violence so that the purpose of punishment can be achieved, namely to provide opportunities for perpetrators to realize their actions and improve the attitudes of perpetrators and protect their rights. Because the death penalty is not effective in suppressing cases of sexual violence in Indonesia.

Keywords: Death penalty · sexual crimes · Islamic law · human rights

1 Introduction

Within the scope of the international community, the recognition of the death penalty has almost no place in a democratic and cultural society. The United Nations Commission

responded as follows: “Although the death penalty has not been banned under international law, the trend towards its prohibition is very clear. The adoption of the Second Optional International Covenant on Civil and Political Rights in 1989 with the aim of abolishing the death penalty is a clear acknowledgment by the international community of the need to eliminate the use of the death penalty in its entirety.”¹

As of June 2006 only 68 countries still apply the practice of the death penalty, including Indonesia, and more than half of the countries in the world have abolished the practice of the death penalty. There are 88 countries that have abolished the death penalty for all categories of crimes, 11 countries have abolished the death penalty for ordinary criminal crimes, 30 countries have imposed a moratorium on the death penalty, and a total of 129 countries have abolished the death penalty. Dead.²

This right must be protected by law. No human being can be carelessly taken away from his life. As explained in Article 3 of the UDHR that the execution of death has violated Article 6 paragraph (1), execution basically causes physical pain and deprivation of a person's right to life, and this is contrary to Article 6 paragraph (1) of the ICCPR and Article 3 UDHR. Even though many countries have not abolished the death penalty, including Indonesia, China and Iraq, the problem is that there is no clear fulfillment and regulation of the implementation of the punishment, both in the arrest process and in the conduct of examinations at trial. This is contrary to the concept of the rule of law where there is a clear arrangement, both equality before the law and also the existence of an independent and impartial judiciary which implies an independent judicial power. Article 6 paragraph (2) of the International Covenant on Civil and Political Rights states that in countries which have not abolished the death penalty, judgments may be given only for the most serious crimes, in accordance with the law in force at the time the crime was committed, and without violating a provision of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Extermination of (ethnic) Nations. This sentence may only be carried out with the final decision of the competent court. Furthermore, Article 6 paragraph (4) of the International Covenant on Civil and Political Rights stipulates that a person who has been sentenced to death must have the right to seek pardon or commutation of sentence. Amnesty, pardon, or commutation of the death penalty may be granted in any chapter. In this case, according to the description above, the author tries to argue by taking into account several aspects, because in understanding a regulation, the philosophical, sociological, and juridical aspects should be considered in carrying out or applying the death penalty, although in human rights the death penalty is prohibited because it is not in accordance with Article 3 of the UDHR and also Many of the countries in the world have abolished the death penalty. In addition to the regulation on basic rights, namely the right to life as regulated in the UDHR which in this case is related to the death penalty, there is an exception to the exercise of this right, namely by having a deep understanding of the existence of derogable rights, namely in the first case “a public emergency which Treatens the life of the nation” can be used as a basis for limiting the implementation of basic freedoms,

¹ <https://jurnalHukum.blogspot.com/2007/05/penelitian-Hukum-untungan-mati-dan-hak.html> Accessed 17 August 2022.

² http://id.wikipedia.org/wiki/punan_mati accessed 17 August 2022.

provided that the state of emergency (public emergency) must be officially declared (be officially proclaimed), limited in nature and should not be discriminatory.³

2 Literature Review

In accordance with the title and problems that will be discussed in this study and in order to provide useful results, this research was carried out with normative juridical research (normative legal research method). The normative juridical research method is library law research which is carried out by examining library materials or secondary data.⁴ This research was conducted in order to obtain materials in the form of theories, concepts, legal principles and legal regulations related to the subject matter. This study uses several references, namely research entitled *The death crime for criminal acts of sexual violence against children in islamic law persfpective* This study discusses the death penalty from the point of view of Islamic law while the author uses two views, namely general law and Islamic law. The next research is a study entitled. *Death Penalty in Sexual Violence Is Not a Solution for Victims*. This study discusses the review of the death penalty for perpetrators of sexual violence. The next research is a study entitled *Legal analysis of the death penalty for sexual crimes* written by Irvan Sitorus, Devi Siti Hamzah Marpaung in 2022 which examines what rules require sexual offenders to be sentenced to death. The next research is a study of application of the death penalty on suspects who have sexual difference in underage children By: Hana Marselia Sihombing Raul Novandi Sinaga Rediys Gulo sustenance 2022.

Cases of sexual crimes are currently being discussed, this is due to the large number of rape cases reported by victims to the police. The crime of rape which is currently happening is not a new problem, this act of rape is a serious matter that must be taken decisively by the government.

This sexual crime can be said to be a crime that has a broad dimension of action and can occur in public and private spaces. This case of rape is more often experienced by women, although it is also possible that men can also experience sexual violence. According to data taken from the 2020 Komnas Perempuan Annual Record, sexual violence against women during the Covid-19 pandemic experienced a fairly large increase, namely 21% (1,731 cases), the most prominent and prominent cases were rape cases, as many as 229 cases, then cases of sexual harassment as many as 181 cases, then cases of sexual harassment as many as 166 cases, and finally sexual violence as many as 962 cases⁵. Thus making many parties agree with the death penalty for perpetrators of sexual crimes.

The theory used in this study is the death penalty, one type of law in the positive legal system in Indonesia. The death penalty in the Criminal Code is the heaviest crime in Indonesian criminal law. The death penalty is a crime in the form of taking the life of the convict. Some experts classify in the Criminal Code the types of crimes that can be

³ Muladi, *The Development of Human Rights (HAM) Dimensions and the Dynamics of the Drafting Process of Human Rights Law (HAKHAM)*, (Bogor: Ghalia Indonesia, 2005), p. 101.

⁴ Soerjono Soekanto and Sri Mahmudji, *Normative Legal Research, A Brief Overview*, (Jakarta: Raja Grafindo Persada, 2003), p. 13.

⁵ Komnas Perempuan Annual Notes for 2020.

sentenced to death, namely: treason against the president and vice president, persuading foreign countries to be hostile or to war if the hostilities are carried out or become war, helping enemies during war, treason against the king or head of state- state of sahab which is planned and results in death, premeditated murder, theft with violence resulting in serious injury or death, extortion with violence resulting in serious injury or death, piracy at sea, coast and river resulting in death, capital punishment outside the Criminal Code. While the death penalty in the Child Protection Act is still burdensome which if it meets the requirements in the form of more than one victim, the victim is seriously injured, the victim has a mental disorder, the victim suffers from an infectious disease, impaired or lost reproductive function of the victim and or the victim dies.

3 Results

3.1 The Death Penalty According to the International Declaration

Currently, there is a global tendency for countries in the world to no longer use the death penalty in their legal system, as can be seen from the issuance of the United Nations Resolution in December 2007 on the prohibition of the death penalty.⁶ However, in practice, it shows the opposite. The practice of the death penalty as a form of criminal sanction still occurs. Throughout 2015, executions of the death penalty globally increased sharply compared to the previous year (2014). At least 1,634 people were executed in 2015: an increase of 573 executions or 54 percent compared to 2014.⁷

The global trend of countries in responding to the death penalty in their sentencing policies can be seen in the following numbers: (i) abolishing the death penalty for all types of crimes totaling 102 countries; (ii) abolishing the death penalty only for ordinary acts totaling 6 countries; (iii) abolishing the death penalty in practice in 32 countries; and (iv) retaining the death penalty in 58 countries.⁸

In 1959, discussion of the death penalty appeared on the UN agenda when the General Assembly approved a resolution asking the Economic and Social Council to study the death penalty both legally and in practice in several countries, and to try to measure the effect of the abolition of the death penalty on crime rates. The study was completed in 1962, with the results of the "Capital Punishment" report presented by Marc Ancel, a jurist from France.⁹

The report provides an important conclusion, that the abolition of the death penalty does not lead to an increase in crime rates. The United Nations then continued research on this subject with the publication of the results of the report (which complemented

⁶ Roger Hood, Introduction, in Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications*, (Farnham: Ashgate Publishing Limited, 2008), p. 1.

⁷ Amnesty International, *Amnesty International Global Report: Death Sentences and Executions 2015*, (London: Amnesty International Ltd, 2016), p. 5.

⁸ Amnesty International, *Amnesty International Global Report: Death Sentences and Executions 2015*, p. 65.

⁹ Marc Ancel, *Capital Punishment*, ST/SOA/SD/9, Sales No. 62.IV.2.

the previous report) in 1967, compiled by Norval Morris.¹⁰ It was only in 1966 that the United Nations was finally able to provide human rights protection in a binding legal formula with the preparation of two draft international agreements, most of which came from the UDHR, namely ICCPR and IESCR.

Efforts to abolish the death penalty globally continue through various other international agreements. The Statute of the International Criminal Tribunal for the Former Yugoslavia (International Criminal Tribunal for the Former Yugoslavia)¹¹ and the Statute of the International Criminal Tribunal for the Rwanda (International Criminal Tribunal for the Rwanda),¹² as an ad hoc international tribunal for crimes such as genocide, crimes against humanity and crimes war, both did not include the death penalty as part of the sanctions. This is in contrast to the Nuremberg Tribunal (International Military Tribunal at Nuremberg, 1945) and the Tokyo Tribunal (International Military Tribunal for the Far East, 1945–1946), both of which were established in the immediate aftermath of the Second World War. This development shows evidence of fundamental changes made by the United Nations in the last 50 years. The death penalty is no longer used, even for the most serious crimes.

This development was strengthened by the 1998 Rome Statute for the International Criminal Court (International Criminal Court). This statute was adopted by the Rome Conference in July 1998, which excluded the death penalty from alternative punishments. In fact, this Court also has jurisdiction to try very serious crimes, namely the crime of genocide, crimes against humanity, war crimes and crimes of aggression. The status of this international criminal tribunal has been in effect since 1 July 2002. With the combination of the substantive provisions on the death penalty relating to the ICCPR and the Second Additional Protocol, the United Nations has provided relatively satisfactory protection against arbitrary actions and other procedural aspects of the death penalty. However, the UN suffers from the same problems as other institutions, namely the general inability and unwillingness at the national level to prevent the implementation of international commitments.

Law enforcement is the process of making efforts to enforce or actually function legal norms as guidelines for behavior in traffic or legal relations in social and state life. Viewed from the point of view of the subject, law enforcement can be carried out by a broad subject and can also be interpreted as law enforcement efforts that involve all legal subjects in every legal relationship. Anyone who applies normative rules or does something or does not do something based on the norms of the applicable law, means that he is carrying out or enforcing the rule of law. In a narrow sense, in terms of the subject matter, law enforcement is only defined as the efforts of certain law enforcement officials to guarantee and ensure that the law is enforced, if necessary, law enforcement officials are allowed to use force.

¹⁰ Norval Morris, *Capital Punishment: Developments, 1961–1965*, Sales No. E.67.IV.15. The two reports, by Ancel and Morris, were published in one issue in 1968, ST/SOA/SD/9 and ST/SOA/SD/10.

¹¹ United Nations Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993.

¹² United Nations Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994.

There are various ways of punishment or the threat of punishment, in this case criminal law as a means to enforce the law. The death penalty is one of the most controversial types of criminal law enforcement in the world. From Babylonian times to the present day, this punishment is still used as a sanction for those accused/proven of a crime. There is no definitive record of the early use of the death penalty. The death penalty can be said to be the most cruel crime, because there is no hope for the convict to fix his crime.¹³ The execution of the death penalty throughout history has been carried out in various ways. When humans are still in a level of thought and technology that is not as advanced as it is today, the way is really cruel and inhumane if we judge it from the point of view of today.

The death penalty for perpetrators of sexual violence will actually shift the state's focus to things that are not more important than the victim. The UN High Commissioner for Human Rights, Michelle Bachelet, also agrees with this. Bachelet said that although the perpetrators of rape and other sexual violence should be held accountable, the death penalty and torture are not the solution. There is no scientific evidence that the death penalty can cause a deterrent effect, including in cases of rape. According to Bachelet, the problem with rape cases that occur in all parts of the world is due to the limited access to justice for victims, and applying the death penalty to perpetrators will not solve this problem. The death penalty is applied precisely when the state fails to attend to the victim. This is a form of "gimmick" that is given as compensation because the state failed to attend and protect victims, as it should have done. As a consequence of this, the state then tries to "prove" itself to appear siding with the victim, by imposing "draconian" crimes such as the death penalty. This, of course, is not what is expected to happen in Indonesia. The state, should be able to be present at any time, not only at certain times just to "grab the hearts" of victims and their citizens.¹⁴

Based on the explanation above, the formulation of the problem in this study, namely How is the death penalty according to the International Declaration? How about the death penalty from the perspective of Pancasila? What is the policy for criminalizing sexual crimes in Indonesia (*Ius Constitutum*? Alternative punishment for sexual crimes in the future (*Ius Constituendum*)?

3.2 Death Penalty in the Perspective of Pancasila

The issue of capital punishment has become a concern of criminal law experts, criminologists, and victimology, especially with regard to the philosophy of punishment, that punishment is not only aimed at making the convict a deterrent, but also paying attention to the victim, so that a restorative justice theory approach is developed.¹⁵ Arief Bernard

¹³ Djoko Prakoso, *Death Penalty Issues (Questions and Answers)*, (Jakarta: Bina Aksara, 1987), p.32.

¹⁴ <https://icjr.or.id/tahunan-mati-dalam-kerasan-sexual-not-solution-bagi-korban/> accessed on 17 August 2022.

¹⁵ Arief. Bernard Siddhartha. *Philosophical Analysis of the Death Penalty in Indonesia*. Paper presented in a workshop organized by the Human Rights Commission, (Bandung, 7 December 2005).

Sidharta, expressed his views on the death penalty, namely;¹⁶ (1) The Pancasila view of life stems from the fact that the universe and everything in it, which is a harmoniously interwoven whole, was created by God Almighty. There is nothing in the universe that stands alone apart from its assembly with the rest of the universe; (2) Also man was created by God and the ultimate goal of his life is to return to his original source, namely God. Each individual human being is equipped with reason and conscience that enables humans to distinguish good from bad, just from unfair, humane from inhuman, necessary from unnecessary, what should and shouldn't be done, what can be done. And what is prohibited, and with that the individual human being has the freedom and ability to determine for himself the choice of actions he (will) do and the life he wants to live. Therefore, each individual human being is responsible for the actions he has or will do. The existence of reason and conscience is the foundation of human dignity; (3) It has been argued that human existence is predestined in togetherness with each other. Thus, the implementation of human life or the process of self-realization of every human being takes place in that togetherness, namely in society. To be able to actualize himself properly, humans need order and regularity (*berekenbaarheid*, predictability, things that can be calculated beforehand) in their togetherness; (3) Carried by the nature of togetherness with each other, the law must be familial;

Bambang Poernomo expressed his view that the death penalty can be accounted for in the Pancasila state, which is embodied as individual protection as well as protecting society for the sake of creating justice and truth in law based on the One Godhead. The practice of implementing imprisonment suffered for a long time by a group of inmates in Nusakambangan and the philosophical basis of Pancasila which does not close the door to the existence of the death penalty, it is concluded that, rather than using the liquidation process of a person's life in a confinement room, it would be better with threats that hard through the death penalty, especially for serious crimes, treason, corruption and smuggling crimes. For this reason, the death penalty is still needed for various reasons;¹⁷ (1) Both in the implementation of the death penalty and imprisonment, if there is an error in the judge's decision, according to the reality, it is not easy to fix it; (2) Based on the Pancasila foundation which is associated with the development of legal science, a line of thought must be drawn about its usefulness for the public interest for the community first and then for individual interests. When there is a conflict between two patterns of interest, then using the backing of the way of thinking that it is better for the efficient operation of the legal order to start with the public interest which is the basis above other interests, in the sense that there is no legal order, then the other interests cannot be implemented.. And besides that, the basis of justification for preventing injustice caused by crime is the reason that *sub sociale* is a public interest for people who have a higher character; (3) In terms of talking about the culture and civilization of the Indonesian nation, it is impossible for the slogan to soar above the reality of the civilizations of other nations, especially against neighboring countries whose civilization has not become inferior in reality because it still threatens and imposes the death penalty; (3) The science of the purpose of criminal law and

¹⁶ Bambang Poernomo. *Criminal Law, Collection of Scientific Writings*. (Jakarta Bina Aksara, 1982), p. 17.

¹⁷ Bambang Poernomo. *Criminal Law, Collection of Scientific Writings*, p. 17.

sentencing cannot completely remove alternative criminal attitudes from elements in the form of retaliation, general purpose, special purpose, education, frightening and destroying for certain crimes, where each of these objectives is used independently. Selective and effective according to the needs according to the event.

3.3 Death Penalty from Islamic Law Perspective

The death penalty is still a debate and raises pros and cons among law enforcement, government, religious leaders and the community. The rise of sexual violence cases that occur in Indonesia is a common concern to prevent and eliminate sexual violence in any form. One of the efforts to prevent and eliminate sexual violence can be done by providing severe sanctions for perpetrators so that the punishment has a deterrent effect and as a warning to other perpetrators of sexual violence.

In Islamic criminal law, the term *jarimah* is known to refer to a crime, the form of punishment is called *uqubah*. *Jarimah* is divided into several classifications, namely *jarimah hudud*, *jarimah Qishash*, *diyat*, and *jarimah ta'zir*. The death penalty is applied in Islamic law for certain *jarimah* that has been stipulated in the *texts*. Such as *qishash* punishment for the perpetrators of *homicide*. Islam strictly prohibits a person from revoking another person's right to life, but in certain circumstances it is permissible to revoke a person's right to life, one of which is the application of punishment for adultery who is subject to stoning.¹⁸

Although in *the text* there is no detailed punishment for sexual crimes. There are opinions that equate sexual crimes with adultery, but only the perpetrators are subject to sanctions. *The uqubah* which is imposed on unmarried adulterers is lashed one hundred times and exiled from his home for one year, while married adulterers are subject to a hundred lashes and stoning to death. There is a view that the perpetrators were immediately stoned without being whipped first. All jurists agree on the provisions of stoning for adultery, with the exception of the Azariqah and Khawarij groups. For the Azariqah group, the punishment for adultery, both *muhsan* and *ghairu muhsan*, is a hundred times volume punishment, this is based on the word of God in QS. Al-Nur: 2. While the basis of the punishment of stoning for *adultery* is narrated from 'Ubadah bi al Shamit Rasulullah SAW said:

عن عبادة بن الصامت قال قال رسول الله صلى الله عليه وسلم: خذوا عني خذوا عني قد جعل الله لهن سبيلا البكر بالبكر جلد مائة و نفى سنة و الثيب بالثيب جلد مائة و الرجم (رواه مسلم)

Meaning: From 'Ubadah bin al-Shamit he said: The Messenger of Allah, said: "Take it from me, take it from me, verily Allah has provided a way out (punishment) for them (adulterers). The punishment for adulterous virgins and virgins is lashed one hundred times and exile for one year, while widowers and widows who commit adultery are punished with a hundred lashes and stoning. (HR. Muslim).¹⁹

¹⁸ 'Abd al-Qadir 'audah, *Al-Tasyri' al-Jinaiy al-Islamiy Muqaranan bil Qanun al-Wadl'iy*, Juz II, Beirut: Dar al Kitab al-Arabi, t, th, p.102.

¹⁹ Imam Abi Husayn Muslim bin Hajjaj al-Qusairy al-Nasaburiy, *Sahih Muslim*, Juz II, Beirut: Dar al Kitab al-Ilmiyah, th., p. 48.

Based on the hadith above, it can be seen that the punishment for adultery is classified into two types depending on whether the perpetrator is married (*muhsan*) or unmarried (*ghairu muhsan*).²⁰

For sexual crimes, if it is qiyased with *had* zina punishment, it can be sentenced to *stoning* to death for married perpetrators and one hundred lashes for unmarried perpetrators. This can be the basis for applying the death penalty for sexual crimes that occur in Indonesia. However, in its application it is not by *stoning* but the execution of the death penalty in another way, considering that Indonesia does not apply the Islamic legal system in its criminal law system.

The implementation of *hadd stoning* in Islamic criminal law can be pursued in two ways, *first*, determining based on the *texts*, *second*, submitting the determination to the authorities (*ulil amri*).²¹ The first method of punishment is carried out in accordance with the provisions set out in the *texts*, there is no interpretation or determination of punishment from the authorities (*ulil amri*). Followers of the first understanding are of the view that the punishment is permanent, does not change due to space and time. While the second way, Islam gives space to the ruler (*ulil amri*) to determine the form of crime and punishment. The form of punishment is adjusted to the context of the community and the value of *maslahat* and *madharat* arising from the punishment.²²

The application of *hudud punishment* in several Muslim countries has resulted in tensions when faced with international human rights law. The implementation of Islamic criminal law in Muslim countries depends on the country's politics and international considerations.²³ According to Mayer, the *hudud punishment* is inconsistent with penological principles and modern human rights norms.²⁴ Even scholars who support the application of *hudud punishment* in some Muslim countries are ambivalent about the application of *hudud punishment*. However, their justifying argument is that it is with the great impact of the punishment that the intent and purpose of the punishment is applied. The proof in Jarimah *Hudud* itself is very heavy, the goal is to avoid doubts and mistakes in determining the punishment so that the adulterer does not get punished by stoning.

Meanwhile, the second way of giving punishment for perpetrators of sexual crimes is *ta'zir punishment*. In contrast to the nature of *hudud punishment* which aims to deter perpetrators, *ta'zir punishment* aims at improving the perpetrators of crimes by giving the state authority to prescribe them. The form of punishment is adjusted to the severity of the act and the impact faced by the victim. *Ta'zir punishment* is considered more flexible and protects the basic right of every human being to live. In some Muslim countries, they are aggressively pursuing the revival and restoration of Islamic law, to bridge this it is necessary to seek an indirect reconciliation between *hudud* and the prohibition of

²⁰ Ahmad Wardi Muslich, *Introduction and Principles of Islamic Criminal Law*, cet. II, Jakarta: Sinar Graphic, 2006. Hlm. 29.

²¹ Ahmad Wardi Muslich, *Introduction and Principles of Islamic Criminal Law Fiqh Jinayah*, Jakarta: Sinar Graphic, 2004, p. 6.

²² *Ibid*, p. 6–7.

²³ El-Awa, MS *Punishment in Islamic Law*, (1982), p. 1.

²⁴ Mayer, p. 37, in Mashood A. Baderin, *International Law, Human Rights and Islamic Law*, (Jakarta: National Human Rights Commission) p.80.

cruel, inhuman and degrading punishments in international human rights law through procedural law in Islamic law.²⁵

3.4 Criminal Policy Against Sexual Crimes in Indonesia (*Ius Constitutum*)

As previously mentioned, perpetrators of sexual harassment can be threatened with criminal penalties with maximum legal snares as long as they meet the elements and there is strong evidence. For example, the sexual harassment article in Article 290 of the Criminal Code threatens the perpetrator with a maximum prison sentence of 7 years, if:

Threatened with a maximum imprisonment of seven years:

- whoever commits an obscene act with a person, knowing that the person is unconscious or incapacitated;
- any person who commits an obscene act with a person even though he knows or should have guessed that generally he is not yet fifteen years old or if his age is not clear, it is not yet time for him to get married;
- any person who persuades a person whom he knows or should reasonably suspect that he is not yet fifteen years old or if his age is not clear it is not yet time for him to marry, to commit or allow obscene acts to be carried out, or to have intercourse outside of marriage with another person.²⁶

The process of sexual crimes that are so external, especially for minors, raises the concerns of various parties, so that to provide a deterrent effect against the perpetrators of these crimes are very diverse, ranging from ordinary things to external processes, the ordinary sentencing process is based on the applicable legal system. In Indonesia, the harshest punishments include life sentences and the death penalty. However, for the opinion that this punishment is not sufficient for the impact of the sexual crime caused, so that external treatment is needed for the perpetrators of sexual crimes.²⁷

For the crime of adultery/decency, the threat of punishment under the Criminal Code is not as severe and wise as the Islamic Criminal Law. Compare this with the so-called crimes against decency articles 281, 282, 283, and articles 284, 285 of the Criminal Code, and others.²⁸

Article 287 paragraph (1) of the Criminal Code reads:

"Whoever has sexual intercourse with a woman out of wedlock, even though she knows or should reasonably suspect that she is not yet fifteen years old, or her age is not clear, that it is not yet time for her to marry, shall be punished by a maximum imprisonment of nine years."

²⁵ Mashood A. Baderin, *International Law, Human Rights and Islamic Law*, (Jakarta: National Human Rights Commission), p. 85.

²⁶ <https://www.Hukumonline.com/klinik/a/Hukum-pidana-pasal-pelecehan-sexual-dan-pemunjukannya-cl3746> accessed on 17 August 2022.

²⁷ Nimrot Siahaan, "Law Enforcement Against Perpetrators of Sexual Crimes Against Minors in Indonesia (Juridical Review of the Criminal System in Indonesia)", *Advocacy*, Vol. 04. No. 01. March 2016, p. 39–40.

²⁸ Muhammad Amin Suma, et al., *Islamic Criminal in Indonesia Opportunities, Prospects, Challenges*, cet. 1, (Jakarta: Pustaka Firdaus, 2001), p. 207.

Criminal acts regulated in Article 287 paragraph (1) of the Criminal Code consist of the following elements:

- Subjective elements: what is known, what it should be guess.
- Objective elements: whoever, having sex outside of marriage, a woman who has not reached the age of 15 (fifteen) years or who has not been able to married.

In order for the perpetrator to be proven to have fulfilled the subjective elements, both the public prosecutor and the judge must be able to prove that the perpetrator does know or at least can suspect that the woman who has sex outside of marriage with him has not reached the age of 15 (fifteen) years. or unmarried.²⁹

Article 294 paragraph (1) of the Criminal Code states:

"Anyone who commits an obscene act with his child, stepson, adopted child, child under his supervision who is not old enough, or with a person who is not old enough to take care of him, his education or care is handed over to him or his bachelor or subordinate who is not old enough, is threatened with with a maximum sentence of seven years."

The definition of this obscene act is an act that is carried out by committing indecent acts related to the victim's body in terms of attacking the honor of the victim in the context of immoral acts, and carried out by adults to minors.

Sexual deviations carried out by means of violence or threats of violence are also regulated in Law Number 23 of 2002 concerning Child Protection, there are two articles that regulate the punishment for perpetrators of sexual abuse against minors, namely Article 81 Paragraph (1):

"Everyone who intentionally commits violence or threats of violence forcing a child to have intercourse with him or with another person, shall be sentenced to a maximum imprisonment of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp.300,000,000.00 (three hundred million rupiah) and at least Rp.60,000,000.00 (sixty million rupiah)."

In this article, the regulation for perpetrators of sexual immorality by means of violence or threats of violence which explains that the punishment for the perpetrator is very severe, namely a maximum of fifteen years in prison and a minimum of three years, at least will make the perpetrators aware of what they have done. The regulation in this article is quite efficient in ensnaring the perpetrators to be able to account for their actions before the law.

3.5 Alternative Punishment for Sexual Crimes in the Future (*Ius Constituendum*)

Imposition of a criminal or not only the responsibility of the judge. As a system, the imposition of this crime is the responsibility of all interested parties, starting from the police, prosecutors, legal advisers, the Witness and Victim Protection Agency (LPSK). Good cooperation between these institutions can encourage the effectiveness of alternative punishment.

²⁹ Tumade Angelina M, "Aspects of Sexual Violence Against Minors", *Lex Crimen*, Vol. IV, No. 2, April 2015, p. 60–61.

Those who commit acts of sexual violence are given criminal sanctions (punishments) in accordance with applicable laws as a form of legal policy for the crimes they have committed. Human behavior that is evil, immoral, and antisocial makes people angry and causes irritation among the people and is very detrimental to the general public. Therefore, these crimes must not be allowed to continue to develop and grow in people's lives, so acts of sexual violence must be eradicated for the sake of order, security, and public safety. The community as a whole, together with the authorized official institutions such as the police, prosecutors, courts, even prisons, and others are obliged to tackle crime as far as possible. Thus, to be able to overcome acts of sexual violence, it is necessary to enforce the law against perpetrators of sexual violence by giving punishments in accordance with the crimes committed to provide a deterrent effect against them so as to reduce as far as possible acts of sexual violence against children which very much befall children in Indonesia.³⁰

Sexual deviations carried out by means of violence or threats of violence are also regulated in Law Number 23 of 2002 concerning Child Protection, there are two articles that regulate the punishment for perpetrators of sexual abuse against minors, namely Article 81 Paragraph (1):

"Everyone who intentionally commits violence or threats of violence forcing a child to have intercourse with him or with another person, shall be sentenced to a maximum imprisonment of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp.300,000,000.00 (three hundred million rupiah) and at least Rp.60,000,000.00 (sixty million rupiah)."

In this article, the regulation for perpetrators of sexual immorality by means of violence or threats of violence which explains that the punishment for the perpetrator is very severe, namely a maximum of fifteen years in prison and a minimum of three years, at least will make the perpetrators aware of what they have done. The regulation in this article is quite efficient in ensnaring the perpetrators to be able to account for their actions before the law.

The death penalty is not the only effective punishment alternative to be imposed in Indonesia for perpetrators of sexual crimes, in this case the perpetrators of sexual crimes who are also human beings are creatures of God Almighty. Is an alternative punishment that can answer the problem regarding perpetrators of sexual crimes that is certainly humanist, according to the principles of punishment and does not violate human rights that is able to provide the best solution, namely an effective punishment is one that deters perpetrators and is able to return the perpetrators of the sexual crimes concerned back to society? become a normal human being and can interact socially with a harmonious, harmonious, harmonious and noble social life in accordance with applicable values and norms.

4 Conclusions and Policy Recommendation

4.1 Conclusions

No human being can be carelessly taken away from his life. As explained in Article 3 of the UDHR that the execution of death has violated Article 6 paragraph (1), execution

³⁰ Law Number 23 of 2002 concerning Child Protection.

basically causes physical pain and deprivation of a person's right to life, and this is contrary to Article 6 paragraph (1) of the ICCPR and Article 3 UDHR. Even though many countries have not abolished the death penalty, including Indonesia, China and Iraq, the problem is that there is no clear fulfillment and regulation of the implementation of the punishment, both in the arrest process and in the conduct of examinations at trial. This is contrary to the concept of the rule of law where there is a clear arrangement, both equality before the law and also the existence of an independent and impartial judiciary which implies an independent judicial power. Article 6 paragraph (2) of the International Covenant on Civil and Political Rights states that in countries which have not abolished the death penalty, judgments may be given only for the most serious crimes, in accordance with the law in force at the time the crime was committed, and without violating a provision of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Extermination of (ethnic) Nations. The death penalty is not the only effective punishment alternative to be imposed in Indonesia for perpetrators of sexual crimes, in this case the perpetrators of sexual crimes who are also human beings are creatures of God Almighty. Sexual deviations carried out by means of violence or threats of violence are also regulated in Law Number 23 of 2002 concerning Child Protection, there are two articles that regulate the punishment for perpetrators of sexual harassment.

4.2 Policy Recommendation

The death penalty is not the only effective punishment alternative to be imposed in Indonesia for perpetrators of sexual crimes, in this case the perpetrators of sexual crimes who are also human beings are creatures of God Almighty. Is there an alternative punishment that can answer the problem regarding perpetrators of sexual crimes that is certainly humanist, according to the principles of punishment and does not violate human rights that is able to provide the best solution, namely an effective punishment is one that deters perpetrators and is able to return the perpetrators of the sexual crimes concerned back to society? be a normal human being and be able to interact socially with a harmonious, harmonious, harmonious and noble social life in accordance with applicable values and norms.

Bibliography

1. Amnesty International, Amnesty International Global Report: Death Sentences and Executions 2015 . London: Amnesty International Ltd, 2016.
2. Amnesty International, Amnesty International Global Report: Death Sentences and Executions 2015 .
3. Amin Suma, Muhammad. Islamic Crime in Indonesia Opportunities, Prospects, Challenges , cet. 1. Jakarta: Pustaka Firdaus, 2001.
4. Angelina M, Tumade. Aspects of Sexual Criminal Violence Against Minors . Lex Crimen, Vol. IV, No. 2, April 2015.
5. Amnesty International, Amnesty International Global Report: Death Sentences and Executions 2015.

6. Audah, 'Abd al-Qadir, Al-Tasyri' al-Jinaiy al-Islamiy Muqaranan bil Qanun al-Wadl'iy, Juz II, Beirut: Dar al Kitab al-Arabi, t.th
7. al-Nasaburiy, Imam Abi Husayn Muslim bin Hajjaj al-Qusairy, Sahih Muslim, Juz II, Beirut: Dar al Kitab al-Ilmiyah, t.th.
8. Bernard Sidharta, Arief. Philosophical Analysis of the Death Penalty in Indonesia. Paper presented at a workshop organized by the Human Rights Commission . Bandung, December 7, 2005.
9. Komnas Perempuan Annual Notes for 2020.
10. United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.
11. United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994.
12. E I-Awa , MS, Punishment in Islamic Law (Indianapolis: American Trust Publications
13. Frank, Hans Goran. Barbaric Punishment: Abolition of the Death Penalty . Jakarta: Human Rights Library, Rauol Wallenberg Institute, 2003.
14. Hood, Roger. Introduction, in Jon Yorke (ed), Against the Death Penalty: International Initiatives and Implications . Farnham: Ashgate Publishing Limited, 2008.
15. Hamza, Andi. Indonesian Death Penalty . Jakarta: Ghalia Indonesia.
16. Levin, Leah. Questions and Answers on Human Rights . Jakarta: Pradnya Paramita. 1987.
17. Marc Ancel, Capital Punishment , ST/SOA/SD/9, Sales No. 62.IV.2.
18. Mashood A. Baderin , International Law, Human Rights and Islamic Law, (Jakarta: National Human Rights Commission)
19. Muladi (ed). The Development of Human Rights (HAM) Dimensions and the Dynamics of the Drafting of Human Rights Laws (HAKHAM). Bogor: Ghalia Indonesia. 2005.
20. Muslich, Ahmad Wardi, Introduction and Principles of Islamic Criminal Law, cet. II, Jakarta: Sinar Graphic, 2006.
21. ----- , Introduction and Principles of Islamic Criminal Law Fiqh Jinayah, Jakarta: Sinar Graphic, 2004
22. Norval Morris, Capital Punishment: Developments, 1961–1965, Sales No. E.67.IV.15. The two reports, by Ancel and Morris, were published in one issue in 1968, ST/SOA/SD/9 and ST/SOA/SD/10.
23. Nimrot Siahaan. Law Enforcement Against Perpetrators of Sexual Crimes Against Minors in Indonesia (Juridical Review of the Criminal System in Indonesia. Advocacy. Vol. 04. No. 01. March 2016.
24. Poernomo, Bambang. Criminal Law, Collection of Scientific Writings . Jakarta Bina Aksara, 1982.
25. Prakoso, Djoko. Death Penalty Issues (Questions and Answers). Jakarta: Literacy Development. 1987. Muladi (ed). The Development of Human Rights (HAM) Dimensions and the Dynamics of the Drafting of Human Rights Laws (HAKHAM). Bogor: Ghalia Indonesia. 2005.
26. Soekanto, Soerjono. Normative Legal Research, A Brief Overview . Jakarta: Raja Grafindo Persada, 2003.
27. Law Number 23 of 2002 concerning Child Protection

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