

CHAPTER I

INTRODUCTION

A. Background of Study

Children are the most important part, which is inseparable from the survival of both the survival of the country and the life of human beings individually. In the constitution of the Unitary State of the Republic of Indonesia, children have a very important role in holding the unity of the state. With the high expectations given by the state to every child of the nation, the childhood phase becomes a very important phase in their lives. To become a person who is able to assume enormous responsibility, the development of children also requires extra love and protection from all kinds of harm that can harm them. Therefore, the state explicitly states that the state guarantees the rights of every child, starting from the aspect of survival, growth, and development, as well as protection from violence and discrimination so that children can grow and develop well and with integrity. The child's rights are protected in Article 28 (B) Paragraph (2) of the 1945 Constitution, which reads that every child has the right to survival, growth, and development and is entitled to protection from violence and discrimination.

Today, sexual violence against children that occurs around the society is not only carried out by the community around the child but also by the child's family environment, both parents and those closest to them. Cases of violence that befell children occur in urban and rural areas due to a lack of supervision, guidance, and promiscuity among children and adolescents. During adolescence, a person experiences development in preparation for

becoming an adult. *Adolescence* is a period prone to negative influences such as drugs, crime, and sex crimes¹.

In the Big Indonesian Dictionary, sexual violence is divided into "violence" and "sexual." The word "violence" itself comes from the word "hard," which means difficult to control. While "sexual" comes from the word "sex." The word "sex" itself is often interpreted as biological gender, namely male and female. Hence, the word sexual (sexual word) is the nature of something related to sex or gender and matters relating to cases of intercourse between men and women. Women, as well as other things that, contain elements of sexual desire².

Sexual violence against children is when someone uses a child for sexual pleasure or satisfaction. Child sexual abuse encompasses not only sexual relations but also actions that lead to sexual activity against children, such as: touching a child's body sexually, whether the child is wearing clothes or not; all forms of sexual penetration, including penetration into a child's mouth using objects or limbs; inducing or forcing a child to engage in sexual activity; intentionally engaging in sexual activity in the presence of children, or not protecting and preventing children from witnessing sexual activity carried out by other people; creating, distributing, and displaying images or films containing scenes of children in indecent poses or actions; and showing children pictures, photographs, or films that display sexual activity³. In general, the definition of sexual violence against children is the involvement of a child in all forms of sexual activity that occurs before the child reaches a specific age limit stipulated by the law of the country concerned, where an adult or other

¹ Sofyan S Wilis, *Remaja dan Permasalahannya, Mengulas Berbagai Bentuk Kenakalan Remaja, Narkoba, Seks Bebas, dan Solusinya*, Alfabeta, Bandung, 2012.

² Depdikbud, Big Indonesian Dictionary: 1996:507

³ www.parenting.co.id. Diakses pada Rabu 08 Februari 2023.

child who is older, or someone who is deemed to know more than a child, use it for sexual pleasure or sexual activity⁴.

Sexual violence against children has become a threat that spreads to all children in Indonesia. As a result of the increase in victims, parents and guardians of minors must be vigilant about this problem. The criminal behavior of sexual violence itself has a fairly high quantity in Indonesia. Data collected by the Coordinating Ministry for People's Welfare between 2010 and 2014 revealed a staggering 21,869,797 reported cases of sexual violence against children, spread across Indonesia's 34 provinces, 179 regencies, and cities. Unfortunately, most of the perpetrators of sexual violence against children come from people who are already known to the victims. Both the perpetrators came from the nuclear family, extended family, and people around their immediate environment.

The Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia, in its efforts to protect women and children, has drawn up various regulations, among them Law Number 23 of 2004 concerning the Elimination of Domestic Violence. As a follow-up, various parties have responded in almost all districts/cities through regional regulations, governor regulations, and regional/guardian regulations by establishing service units for handling violence with various names, such as the Women Crisis Center (WCC), the Integrated Service Center (PPT), the Integrated Services for the Protection of Women and Children (P2TP2A), which consists of elements of related SKPD, hospitals or medical services, Law Enforcement Officials (APH), Non-Governmental Organizations (NGOs), Child Protection Institutions (LPA) and Religious Organizations. In this effort, the Government of the Republic of Indonesia, through the Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia, built the PPA SYMPHONY system

⁴ CASAT Program, Child Development Institute; Boy Scouts of America;

(Online Information System for the Protection of Women and Children). In the PPA SYMPHONY system itself, in one year, there were data on cases of sexual violence against children amounting to 6,475 cases, with the highest ratio being experienced in the Riau Archipelago area, which reached more than 750 victims. Based on age, most of the victims were aged 13-17 years, with the highest average number of victims being girls at 30.2%, while those under the age of 6-12 years with a ratio of 14.9% ⁵.

As an example of a recent case, a 55-year-old male Qur'an teacher in Makassar, South Sulawesi, was reported to have sexually assaulted his students. The head of the Makassar Women and Children Empowerment Center (P2TP2A), Andi Tenri Pallalo, said that his party had so far received a total of five reports against the teacher with the initials MP from the victim's family. "We have been handling this case since last week. We are assisting and conducting a psychologist's assessment because the victim is still underage," said Tenri Saturday. He said the victims were girls aged 9 to 12 years. The abuse came to light after one of the victim's mothers became suspicious about why her daughter suddenly refused to go to class. "Upon interrogation, the girl said that her teacher abused her," Tenri said. After the mother reported allegations of sexual abuse, other victims' families came forward with similar accusations. Tenri said that there may still be other victims who have not reported it. Head of Women and Children Protection Unit (PPA) Makassar Police Inspector. Ismail said police had received reports of three victims as of Saturday. He said, according to the testimony of the victims, members of parliament sexually abused them during Qur'an lessons. "The Qur'an teacher will approach the victims, and then he will put his hands under their clothes and touch their genitals," Ismail added; however, the lawmakers have not yet been summoned for questioning, as the police are still gathering evidence to corroborate the case. "We have coordinated with the P2TP2A psychologist

⁵ www.kekerasan.kemenpppa.go.id. Diakses pada Rabu 08 Februari 2023.

team regarding the results of the victim assessment," he said. "We have also coordinated with the hospital for physical examinations and collection of evidence"⁶.

As a form of protecting children in Indonesia, the state also makes regulations regarding efforts to protect children and victims. The Criminal Code, specifically Law No. 23 of 2002 as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, Law No. 23 of 2004 concerning the Elimination of Domestic Violence (KDRT), and Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, collectively provide robust legal protections for children against acts of sexual violence. The form of child protection provided by the Child Protection Act and the Law on the Elimination of Domestic Violence and the Juvenile Justice System is an adoption, compilation, or reformulation of the forms of child protection that have been regulated in the Criminal Code.

In the Criminal Code, there are several articles that provide protection for children against sexual violence; protection for children is shown by the provision of criminal law (sanctions) for perpetrators. This is stated in the Criminal Code in the following articles; Sexual intercourse is regulated in Article 287, Article 288, Article 291; Obscene acts are regulated in Article 289, Article 292, Article 293, Article 294, Article 295, and Article 298.

In Islamic law, basically everything related to sexual intercourse with fellow men, or with fellow women, as well as with the opposite sex, both from the old to the young, are all acts of adultery⁷. In the view of Islam, it is forbidden to act of sexual violence or adultery because this act not only harms others but also harms oneself. The act of adultery is a grave sin. However, Islam itself does not deny that every human being needs to satisfy his

⁶ www.thejakartapost.com. Diakses pada Jum'at 10 Februari 2023.

⁷ Abdul Qadir Audah, *Ensiklopedia Hukum Islam*, Ctk Pertama, Vol. IV, PT. Van Hoeve's New Attempt, Jakarta, 1997, Hlm. 151

biological desires, it's just that committing adultery is not recommended but can be done through legal marriage. This act in the view of Islamic law explains that every sexual act committed if not to a woman who does not belong to him (his wife) can be said to be adultery. In the words of Allah SWT :

"And those who guard their genitals, except for their wives or enslaved people, then in fact they are not reprehensible in this matter. Whoever seeks what is behind it, then they are the ones who transgress the limits"⁸.

Some scholars explained the meaning of adultery. According to Malikiyah scholars defined “*adultery*” as the act of *mukallaf* having sexual relations with the son of Adam, who is not his unanimously (without any doubt) and intentionally. Hanafiyah scholars defined *adultery* as the act of a man having sexual intercourse with a woman in the Kubul without belonging and resembling property. Syafi'iyah scholars defined *adultery* as inserting the penis into an unlawful organ without any doubt and instinctively inviting lust. Hanabilah scholars defined adultery as an abominable act on the foreskin or anus. Zahiriyah scholars defined *adultery* as having intercourse with someone who is not lawful to look at, even though he knows the law is haraam, or intercourse is haraam. Zaidiyah scholars defined *adultery* as inserting the genitals into the genitals of a living person, which is forbidden, both into the forebrain and the anus, without any doubt. The jurists gave different definitions of adultery, but they that adultery is sexual intercourse that is forbidden and intentional.⁹

⁸ Q.S. Al-Mu'min Ayat 5-7

⁹ Abdul Qadir Audah, *Ensiklopedia Hukum Islam*, Ctk Pertama, Vol. IV, PT. Van Hoeve's New Attempt, Jakarta, 1997, Hlm. 160.

Given the limited similarities in the child protection and the sentencing system regarding sexual violence against children under both Indonesian and Islamic criminal law, this study raised the title “Sexual Violence Against Children and Its Sentencing System From The Perspective Of Islamic Criminal Law And Indonesian Criminal Law.

B. Problem Formulation

1. What are the philosophical aspects of the crimes of sexual violence against children from the perspective of Islamic criminal law and positive criminal law?
2. How is the sentencing system of sexual violence against children according to Islamic criminal law and Indonesian criminal law?

C. Research Objective

1. To analyse about the philosophical aspects of sexual violence against children from the perspective of Islamic Criminal Law and Indonesian Criminal Law.
2. To analyse the comparison of the sentencing system of sexual violence against children from the perspective of Indonesian criminal law and Islamic criminal law.

D. Originalities of Research

To confirm the validity of the research shown in the following table, the author performed the following searches with a number of earlier studies that had both parallels and differences:

No	Sources	Discussions
1	<p>Bagas Adhi Sungkono, Pedophilia Crime in the Perspective of Islamic Criminal Law and Positive Criminal Law, Faculty of Law, University of Muhammadiyah Magelang, 2020</p>	<p>Problem Formulation :</p> <ol style="list-style-type: none"> 1. How is the crime of pedophilia from the perspective of Islamic criminal law? 2. How is the crime of pedophilia from the perspective of positive criminal law? 3. What are the similarities and differences in the views of Islamic criminal law and positive criminal law on pedophilia? <p>Conclusions :</p> <ol style="list-style-type: none"> 1. Pedophilia is not actually a crime because it refers to an adjective, but will be a finger deed is done. The criminal act of pedophilia, according to Islamic law, in terms of the elements of the action at first glance, resembles an act of adultery. However, if it is traced to the finger of adultery, then the aspect of the finger of adultery is not fulfilled in it. The

		<p>crime of pedophilia is not included in the category of adultery or hudūd punishment; The crime of pedophilia is classified as jarimah in the form of immorality because there is no text that regulates the crime of pedophilia. The criminal act of pedophilia is handed over to the authorities/ulil amri. The form of the sanction is if you are not married, and it is proven that you can be whipped 100 times, according to Al-Qur'an Surat An-Nur verse 2. Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection Article 3 states that the protection of Children aims to guarantee the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with their dignity. Human dignity, for the realization of quality, noble, and prosperous Indonesian children. Policies for handling pedophilia are used through legal</p>
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		<p>channels so that criminal law policies must be directed towards the goals of child welfare policies and social welfare policies.</p> <p>2. Learned to deal with pedophilia which is included in the scope of criminal policy, which is an integral part of community protection efforts to prevent children from criminal acts of pedophilia so that children get guaranteed protection for the best interests of children in society, and obtain proper legal protection. If married, then stoned to death. This provision can change considering that pedophilia includes picking a finger so that it can be less or more of the sanctions.</p> <p>3. The content of positive criminal law legislation is generally in line with Islamic criminal law if understood contextually; That is, they equally protect children's rights and are obliged to protect children from all forms of abuse and even obscenity.</p>
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		<p>Some of the differences between positive criminal law and Islamic criminal law are regarding criminal sanctions, age limits for children, and different sources of law</p>
2	<p>Nur Hot Maida, Analysis Study Between Islamic Law and Positive Law Concerning Pedophilia Crimes in Indonesia, Faculty of Islamic Studies, Islamic University of Indonesia, 2018.</p>	<p>Problem Formulations :</p> <ol style="list-style-type: none"> 1. What is the Criminal Act of Pedophilia According to Positive Law and Islamic Law? 2. What is the legal protection policy for children in pedophilia crimes in Indonesia? <p>Conclusions :</p> <ol style="list-style-type: none"> 1. The criminal act of pedophilia, according to Islamic law, in terms of the elements of the act, at first glance, resembles adultery. However, if traced in the criminal act of adultery, the element of adultery is not fulfilled, then the crime of pedophilia is not included in the crime. Regarding adultery or hudūd punishment, pedophilia crimes are categorized in

		<p>Jarimah ta'zir because no text regulates pedophilia crimes, so the sanctions for pedophilia crimes are handed over to the authorities or Amir, while in Positive Pedophilia Criminal Law, sanctions in imposing criminal penalties for perpetrators pedophilia, is not regulated significantly. However, in sentencing, the sanction referred to is the imposition of punishment for perpetrators of sexual crimes, such as sexual harassment and obscenity, based on other laws and regulations.</p> <p>2. In Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection Article 3 it states that: Child protection aims to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally following human dignity and worth, for the realization of quality, noble, and prosperous Indonesian children,</p>
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		<p>children's rights are part of the human rights contained in the 1945 Constitution and the UN Convention on the Rights of the Child which regulate various aspects of children's lives as a nation and state. , every child has the right to a decent living, to grow, to develop, and to receive good care and health services. Pedophilia control policies are used as legal means so that criminal law policies must be directed towards the goals of child welfare policies and social welfare policies. The policies studied to tackle pedophilia are included in the scope of criminal policy, which is an integral part of efforts to protect society to prevent children from criminal acts of pedophilia so that children get guarantees of protection for the best interests of children in society and get proper legal protection.</p>
3	Fauzan, Criminal Sanctions Against Pedophiles According to Positive Law	Problem Formulations :

<p>in Indonesia and the Perspective of Islamic Criminal Law, Faculty of Sharia and Law, UIN Syarif Hidayatullah Jakarta, 2015.</p>	<ol style="list-style-type: none"> 1. What are the criminal sanctions for perpetrators of sexual abuse of minors (pedophiles) in the view of Positive Law in Indonesia? 2. What is the view of Islamic Law regarding Criminal Sanctions for perpetrators of sexual abuse of minors (Pedophilia) in Positive Law in Indonesia? 3. What are the obstacles in enforcing criminal sanctions for perpetrators of sexual abuse of minors in Indonesia? <p>Conclusions :</p> <ol style="list-style-type: none"> 1. Criminal sanctions for perpetrators of sexual abuse of minors in a positive law perspective are adjusted to sanctions for perpetrators of pedophilia according to Law no. 23 of 2002 concerning Child Protection, namely: <ol style="list-style-type: none"> a) Whoever deliberately commits violence or threats of violence to force a child to have sex with him or with another person shall be punished with
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		<p>imprisonment for a maximum of 15 (fifteen) years and a minimum of 3 (three) years and a maximum imprisonment of 1 year. Maximum fine of Rp. 300,000,000.00 (three hundred million rupiahs) and a minimum of Rp. 60,000,000.00 (sixty million rupiahs).</p> <p>b) Whoever deliberately commits violence or threats of violence, forces, tricks, lies, or persuades a child to commit or allow obscene acts to be carried out, shall be punished with imprisonment for a maximum of 15 (fifteen) years.) years and a minimum of 3 (three) years. 3) years and a maximum fine of Rp. 300,000,000.00 (three hundred million rupiahs) and Rp. 60,000,000.00 (sixty million rupiahs).</p> <p>c) Any person who exploits children economically or sexually intending to benefit themselves or others shall be punished with imprisonment for a maximum of 10 (ten) years and/or a</p>
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		<p>fine of up to Rp. 200,000,000.00 (two hundred million rupiahs).</p> <p>2. According to the view of Islamic law, the criminal law for perpetrators of molestation of minors in positive law is lighter. In fact, there are still many pedophiles who are still around and threaten a danger to the children of the Indonesian nation. In Islamic criminal law, material rape contains an element of aggravation which is of a higher quality than adultery because rape involves acts of violence and coercion. This effort places the perpetrator in a very dominant role in realizing the crime of sexual violence. In Islamic criminal law, formally, the existence of evidence other than witnesses must still be considered to seek the material truth of a criminal case. Victims of crimes of sexual violence are not offended by the unfair application of the law. The punishment for unmarried offenders is</p>
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		<p>lashing and exile for one year, while those who are married are stoned.</p> <p>3. Obstacles in treating victims during the criminal justice process, law enforcement officials (police, prosecutors, judges) still treat victims of sexual violence as objects, not subjects whose legal rights must be heard and respected. Most of them still make the victim a victim for the second time (revictimization) of the case they experienced. Victims are still often blamed by most law enforcement and not given the protection they need. The handling of cases of violence against children must be holistic and integrated. All parties need improvement and treatment, both from the medical side, the internal side of individual appreciation, legal aspects, which still contain many weaknesses, social support, economic support, as well as political steps and advocacy.</p>
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It is clear from the description in the table above that the author's study is original and that any other parties have not vetted it. The validity of this study can be verified by the author's own views following the three tenets of science: objectivity, honesty, and reason.

E. Theoretical Review

1. Sexual Violence against Children

According to Sigmund Freud, every human being has a libido (lust) that always demands to be vented¹⁰. However, in this case, the demand to vent the libido that nests in the human body cannot always be realized by humans, the reason is because of social norms, such as religious norms, decency and law. It is in these social norms that what conditions apply to channel the libido that always demands to be vented. For example, in legal norms it is regulated at what age a person can have sexual relations or in norms of decency and decency it is regulated that a person may not show his lust through body language in front of other parties who are not his wife or in religious norms it is regulated that a person can only have sex if he has officially married his adult partner. As has been explained, the diversion of libido occurs because of the social norms prevailing in society.

However, to divert libido into a positive form, social norms alone are not enough. There must be strict collective control from the community over the behavior of everyone in the local community. This is also accompanied by strict and firm control over the enforcement and observance of existing social norms. If this collective control is not carried out, then this does not rule out the possibility that it will encourage the emergence of actions to divert libido in a negative form.

¹⁰ Sigmund Freud, *Beyond the Pleasure Principle*, W.W. Norton & Company, Jerman, 1920 .