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Dual Legal Frameworks on Forced Child Intercourse: Harmonizing Islamic Criminal Law and State Law

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Abstract: This study analyzes legal enforcement regarding forced child intercourse, focusing on Decision Number 714/Pid.Sus/2023/PN Medan. Employing a normative juridical method, this research evaluates the disparity in sanctions between Indonesian Positive Law and Islamic Criminal Law. The findings reveal that the defendant's 7-year sentence, while legally valid under the Child Protection Act, fails to provide substantial justice given the victim's psychological trauma. From an Islamic perspective, the act constitutes *zina muḥṣan*. However, due to evidentiary challenges regarding *ḥadd*, the principle of maximum discretionary punishment (*ta'zir al-quswa*) applies, particularly since the offender is a *maḥram* (incestuous guardian). Islamic legal options include capital punishment, life imprisonment, and financial compensation (*mahr al-mithl*) for the victim. The study concludes that harmonizing positive law with Islamic principles of aggravated punishment is crucial to ensure proportional sanctions and comprehensive child protection.

Keywords: Forced Child Intercourse, Child Protection, Islamic Criminal Law.

Abstrak: Penelitian ini menganalisis penegakan hukum terhadap tindak pidana pemaksaan persetubuhan anak, dengan studi kasus Putusan Nomor 714/Pid.Sus/2023/PN Medan. Menggunakan metode yuridis normatif, studi ini mengevaluasi kesenjangan sanksi antara hukum positif Indonesia dan hukum pidana Islam. Temuan menunjukkan bahwa vonis 7 tahun penjara terhadap terdakwa, meskipun legal berdasarkan UU Perlindungan Anak, dinilai belum memenuhi keadilan substantif mengingat dampak psikologis korban. Dalam perspektif hukum Islam, tindakan ini memenuhi unsur *zina muḥṣan*. Namun,

karena hambatan pembuktian *ḥadd*, mekanisme *ta'zīr* dengan pemberatan maksimal (*ta'zīr al-quswā*) harus diterapkan, terutama karena pelaku adalah *maḥram*. Opsi sanksi Islam mencakup hukuman mati, penjara seumur hidup, serta kompensasi (*mahr al-mithl*) bagi korban. Penelitian menyimpulkan bahwa harmonisasi antara hukum positif dan prinsip pemberatan pidana Islam sangat krusial untuk menjamin efek jera yang proporsional serta perlindungan anak yang komprehensif.

Kata Kunci: Memaksa Anak Bersetubuh, Perlindungan Anak, Hukum Pidana Islam

A. Introduction

One of the phenomena of crime that always occurs in society is sexual crime and sexual harassment. This crime is a form of violation of moral norms which is a national legal problem, it is also a legal problem in almost all countries in the world and the practice of sexual crimes that occur today has a lot of victims who are children. Children are the successors to the ideals of a nation's struggle. In addition, children are the hope of parents, the hope of the nation and state who will continue the baton of development and have a strategic role, have special characteristics or characteristics that will ensure the continuity of the existence of the nation and state in the future[1].

The background of this study is driven by the increasing number of child sexual violence cases in Indonesia, which not only cause legal issues but also serious psychological impacts on victims. Research by psychologists such as Huraerah (2021) and Sari & Mulyana (2022) shows that victims of child rape often

[1] Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak Di Indonesia* (Bandung: Refika Aditama, 2008).

experience post-traumatic stress disorder (PTSD), depression, anxiety, and long-term emotional disturbances that affect their development and social interaction. These facts underline that the issue of sexual violence against children is not only a matter of law but also a profound humanitarian and psychological problem that demands comprehensive handling.

In this day and age, forcing violence to have sex is not a common thing for the community. Forced intercourse occurs in various villages or regions, both for adults and children. There are several cases of forcing children to have sex by the closest person to the child. One example is the case in Decision Number 714/Pid.Sus/2023/PN. Medan experienced by SPLL where the perpetrator was his own uncle and the child who was the victim of forced sexual intercourse was still 12 years old. As stated in the sitting of the case "Intentionally committing violence or threats of violence, coercing, committing deception, a series of lies, or inducing to have intercourse with him or with another person."

In the case of forcible intercourse with the parents, it is included in the category of a decent crime, in this case it is regulated in articles 280 (2) and (3) of KUHP[2]. Acts that commit immoral acts of the victims are minors and also immoral acts of laws and regulations, especially the Child Protection Law which are very moving and stipulate severe punishments because the victim is a child can experience trauma, fear and also very embarrassing for the family.

Emotionally, children as victims who are forced to have sex with their parents experience stress, depression, mental disorders,

[2] Yustisia, *Kitab Undang-Undang Hukum Pidana* (Jakarta: Gramedia Press, 2016).

feelings of guilt and blame, fear of being in contact with others, the child's image where the child is forced to have sex with parents, insomnia nightmares, fear of things related to abuse including objects, smells, and places to visit doctors, self-esteem problems, sexual dysfunction, chronic pain, suicidal thoughts. In addition, psychological disorders such as post-trauma arise[3].

So it can be seen that if there is no courage from the victim to report this case to the authorities, of course this will have a bad impact on the lives of children and people who experience it. In Law Number 17 of 2016, precisely in article 54, it is explained that "Every child has the right to be able to live, grow, develop, and participate reasonably in accordance with the dignity and dignity of humanity, as well as to be protected from violence and discrimination."

Islamic law is essentially Allah's regulation to organize human life, which becomes real when Muslims consciously obey every command and avoid every prohibition in the Qur'an and Hadith. One of the prohibited acts is forcing someone, including children, to engage in sexual activity, known as rape. Although the term "rape" is not explicitly mentioned in the Qur'an, its equivalent concept, *ikrah* (الإكراه), meaning coercion or compulsion, appears in several verses, including Surah An-Nur verse 33. In Islamic criminal law (*fiqh jinayah*), rape (*ightisab*) is a severe crime (*jarimah*) that demands strict punishment to protect human dignity. The application of Islamic criminal sanctions, such as in Aceh and several Muslim countries, has proven effective in reducing sexual

[3] Ivo Noviana, "Kekerasan Seksual Terhadap Anak: Dampak Dan Penanganannya Child Sexsual Abuse: Impact And Hending," *Pusat Penelitian Dan Kesejahteraan Sosial* 1, no. 1 (2015): 9.

crime rates and raising moral awareness. This is because Islamic law not only punishes offenders but also aims to purify the soul and restore social harmony objectives that secular regulations often fail to achieve.

Rape in Arabic is called *al-wath'u bi al ikraah* (sexual intercourse by coercion)[4]. Rape cases also occurred during the leadership of Umar Bin Khattab, which was narrated by Abdurrazaq in Al-Mushannaf and Al-Baihaqi in As-Sunan, Actually Umar r.a came with a woman who was found by a shepherd in the middle of the Sahara desert. At that time he was thirsty, and he tried to ask the male shepherd who found him to drink, but the shepherd would not give him a drink, unless the woman surrendered his honor. The woman tried to refuse him and refused to serve his request, and still hoped in the name of Allah that he could get a drink from the man. But the man still did not give her a drink, until she was very thirsty, because she was very compelled to do so, and then she gave herself up to the man. In response to this case, Umar did not sentence the *woman to hadd*, on the pretext that the act was carried out because it was forced (emergency)"[5].

There have been several previous studies showing that discussions about the crime of sexual intercourse with children are generally focused on the juridical aspects of punishment, regulatory problems, and legal protection for victims. Fariaman Laia's research focuses on the penal mechanism and the role of

[4] Abd Al-Qadir Audah, *At-Tasyri' Al-Jinaiy* (Beirut: Dar al-Kitab al-'Arabi, n.d.).

[5] Kharisatul Janah, "Sanksi Tindak Pidana Pemerkosaan Oleh Anak Dalam Perspektif Hukum Pidana Islam," *TA'ZIR: Jurnal Hukum Pidana,* 4, no. 2 (2020): 78.

judges in determining criminal threats in accordance with the provisions of the law.[6] Ibnu Maulana Zahida and friends (2020) highlight the need for equality in legal arrangements and affirm that criminal responsibility cannot be transferred to parents.[7] Meanwhile, Hana Aulia Putri (2019) emphasized the weak legal protection for children as victims of rape in the family and the suboptimal role of the government.[8] Alvi Rahmawati's research concludes that the regulation of child rape offenses involving underage victims has been explicitly stated in Law No. 35 of 2014 on Child Protection, which also guarantees children's rights to handling, protection, and recovery outside judicial processes.[9] Meanwhile, the study by Syifah Aziza Ismail and Lisnawaty highlights inconsistencies in the application of Article 81(3) of the Child Protection Law, noting that although the provision allows for a maximum penalty of 20 years, judicial decisions often impose lighter sentences. Their research underscores the importance of

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[6] Fariaman Laia, "Tinjauan Yuridis Pemidanaan Pelaku Tindak Pidana Persetubuhan Terhadap Anak," *Jurnal Panah Keadilan* 2, no. 1 (2023): 73.

[7] Ibnu Maulana Zahida, Arum Ayu Lestari, and Sindi Dwi Yunike, "Problematika Tindak Pidana Persetubuhan Antara Anak Laki-Laki Dengan Anak Perempuan," *Jurnal Rechtens* 10, no. 1 (2021): 1–12.

[8] Hana Aulia Putri, "Perlindungan Hukum Terhadap Hak Anak Korban Pemerkosaan Dalam Lingkungan Keluarga," Jurnal Lex Renaissance 6, no. 1 (2021): 12–24, https://doi.org/10.20885/jlr.vol6.iss1.art2.

[9] Alvi Rahmawati, Sinarianda Kurnia Hartantien, and Universitas Bhayangkara Surabaya, "TINDAK PIDANA PEMERKOSAAN TERHADAP ANAK DIBAWAH UMUR (NOMOR 116/PID.SUS/2020/PT JMB)," *JUDICIARY (Jurnal Hukum Dan Keadilan)* 12, no. 1 (2023): 55–63.

legal certainty as a constitutional principle under Article 1(3) of the 1945 Constitution of Indonesia and criticizes the lack of consistency in applying Article 64(1) of the Criminal Code, which weakens the realization of justice and the rule of law. [10] These five studies have not yet examined the crime of child sexual intercourse from a perspective that simultaneously considers both positive law and Islamic criminal law; therefore, this study seeks to fill that theoretical and analytical gap.

Therefore, based on the existing theoretical and empirical gap, this study aims to analyze the crime of forced sexual intercourse against children by combining two legal perspectives Indonesian positive law and Islamic criminal law in order to formulate a more comprehensive understanding of justice and child protection. The study also seeks to contribute academically by integrating normative legal analysis with moral-religious values in addressing sexual crimes against minors.

This shows that cases of forcing children to have sex still occur frequently and are a serious concern, especially because it involves children as victims and perpetrators who come from the immediate environment. Therefore, it is important to analyze Decision Number 714/Pid.Sus/2023/PN Medan not only from a positive legal perspective through the Child Protection Law, but also from the perspective of Islamic criminal law. This analysis aims to find out how the two legal systems provide protection for

[10] Syifah Aziza Ismail, Lisnawaty W Badu, and Julisa Aprilia Kaluku, "Analisis Putusan Tindak Pidana Pemerkosaan Pada Anak Di Bawah Umur (Studi Putusan Pengadilan Negeri Limboto Nomor : 115/PID.Sus/2022/PN.LBO)," *Amandemen: Jurnal Ilmu Pertahanan, Politik Dan Hukum Indonesia* 1, no. 3 (2024): 250–63.

children as victims, as well as how the views and sanctions given in each legal system to perpetrators of the crime of forced sexual intercourse against children, so as to provide a deeper understanding of justice and legal protection for child victims of sexual violence.

B. Method

This research is a normative juridical research. The normative juridical research method is literature law research conducted by examining mere literature materials or secondary data.[11] Research is normative, that is, research is carried out by researching literature or secondary materials, normative legal research is also referred to as doctrinal law research.[12] As a legal research[13] and in accordance with the typical character of jurisprudence. As well as the substance of the problem or legal issue to be studied in the research, the approach to be used is adjusted to the problem to be studied. In this study, a statutory approach is used. Data were collected through a document-based review by identifying, selecting, and examining relevant legal materials. The primary data, such as court decisions and legal texts, were obtained from official government and judicial sources to ensure authenticity. Secondary data, including books, journals, and credible online databases, were selected based on their academic reliability and relevance to the

[11] Irwansyah, *Penelitian Hukum: Pilihan Dan Metode Praktik Penulisan* (Yogyakarta: Mirra Buana Media, 2020).

[12] Lexy j. Moleong, *Metode Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2018).

[13] Wahyudin Darmalaksana, "Qualitative Research Methods for Literature Studies and Field Studies," *Pre-Print Digital Library UIN Sunan Gunung Djati Bandung*, 2020.

research topic. Each source was verified by cross-checking between legal provisions and scholarly interpretations to maintain validity and accuracy. This research uses two data sources, namely primary data sources consisting of Decision Number 714/Pid.Sus/2023/PN. Medan, the Qur'an and Hadith, the Criminal Code, the Child Protection Law, books and articles related to the discussion of forcing children to have sexual intercourse, as well as secondary or supporting data derived from other literature related to this study. Processing techniques for the collected legal materials are carried out in stages, inventory, identification, classification and systematization. The analysis was carried out using normative legal analysis techniques, including statutory interpretation, conceptual analysis, and comparative approaches. The statutory interpretation method was used to understand the meaning and intent of legal provisions, particularly within the Child Protection Law and the Criminal Code. The conceptual and comparative approaches were applied to align positive law with Islamic criminal law principles, enabling a comprehensive assessment of how both legal systems address the issue of forced sexual intercourse against children.

C. Forced Child Intercourse: Legal Definitions and Criminogenic Factors

"Force" means that it is against the will of the woman or against the will of the woman, Prof. Satochid Kartanegara, S.H in Leden marpaung stated, among others: "This act of coercion must be interpreted as an act in such a way as to cause fear to others [14].

[14] Leden Marpaung, *Kejahatan Terhadap Kesusilaan* (Jakarta: Sinar Grafika, 2008).

With the qualification of *Verkraching*, in Article 285 of the Criminal Code, a criminal act is formulated in the form of: With violence or threats to force a woman to have intercourse with him outside of marriage, with a maximum penalty of twelve years in prison. The Indonesian translation of the word *verkrachting* is rape, but this translation even though it is only about the name of a criminal act is not appropriate because among the Dutch verkrachting already means rape to have sexual intercourse. Therefore, the qualification of a criminal act from Article 285 of the Criminal Code must be rape for sexual intercourse. So the coercion must be viewed from many angles, for example whether the coerced is weaker than the coercion, whether there is no other way, whether the coercion is really balanced when obeyed and so on [15].

In this study, what is meant by forced intercourse focuses on actions in which children as victims are forced to have sexual intercourse by adults or close relatives. These actions include various forms of coercion, both physical and psychological, carried out by individuals who are supposed to protect and keep children safe. This coercion often involves manipulation, threats, or unbalanced influence, which causes the child to feel depressed and have no choice but to refuse.

Basically, children must be protected so that they do not become victims of anyone's actions (individuals or groups, private organizations or governments) [16], The meaning of victim in a narrow sense as stated by Perkins as: *a crime is any social harms de*

[15] Frans Maramis, *Hukum Pidana Umum Dan Tertulis Di Indonesia* (Jakarta: Hukum Pidana Umum dan Tertulis di Indonesia, 2016).

[16] Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dan Perempuan* (Jakarta: Refika Aditama, 2018).

finned and punishable by law. In the sense of Legal definitions of crime, the definition of victim is as suffering losses suffered by a person or group of people due to evil acts as formulated and can be punished in criminal law [17].

Acts of violence experienced by children are actually acts that always have a long-term impact, and become a nightmare that never disappears from the minds of children who are victims. Theoretically, it can be said that sexual harassment and violence against women by men is in essence a very complex phenomenon, rooted in power relations based on gender, sexuality, self-identity, and influenced by the social institutions that develop in the community [18].

Every event, including a violent crime experienced by a child, is inseparable from various underlying causal factors. Among them are the following factors:

1. There is no social control over acts of violence against children.
2. The relationship between children and adults is like a social hierarchy in society.

In the context of forcing intercourse, there are a number of reasons that contribute to the occurrence of this cruel act. In general, there is already a relationship between the perpetrator and the victim first, the relationship between the perpetrator and the victim has been used by the perpetrator to commit the sexual violence. The closeness of the relationship between the perpetrator and the victim is a factor that is quite influential in the occurrence

[17] Maya Indah, *Perlindungan Korban Suatu Perspekstif Viktimologi Dan Kriminologi* (Jakarta: Kencana, 2014).

[18] Bagong Suyanto, *Children's Social Problems* (Jakarta: Kencana, 2017).

of sexual violence. When the relationship between the perpetrator and the victim is so close, the victim loses control or supervision, on the other hand the perpetrator is encouraged to commit sexual violence because he has the opportunity to do so. In addition to the proximity factor or relationship between the perpetrator and the victim, it is also caused by the role of the perpetrator and the position of the victim. The following are some of the factors that affect the occurrence of the crime of forcing children to have sex with their closest relatives:

1. Environmental factors, the situation in the family environment is the lack of efficient family anticipation of children such as a child being left to play or travel alone without intensive assistance and supervision so that the child can be properly supervised, with whom the child plays or with whom the new friends the child knows and knows.
2. Media factors, One of the factors that contribute to influencing the occurrence of criminal acts of molestation against minors is the media factor. The media is an efficient and effective means of disseminating information to the wider community, because at a relatively low cost in accordance with the ability and able to reach the public in a significant amount of time[19].
3. Lack of Understanding of Religion Factor, the cause of a crime is determined by the issue of harmony, religion or the relationship between humans and God. According to this theory, the farther a person's relationship with his god through the intermediary of the religion he adheres to, the closer a person's intention to commit crime. If a person does not

[19] Von Henting, *Kejahatan Dalam Masyarakat Dan Pencegahannya* (Jakarta: Bina Aksara, 1987).

understand his religion properly, it will cause his faith to be weakened. If this is the case, then it is very easy for a person to do something bad [20].

So from the explanation above, it shows that the crime of violence against children, especially in the context of forced sexual intercourse by adults or close relatives, is influenced by various interrelated causal factors. First, the lack of social control over these violent acts allows the perpetrator to act without fear of consequences. The close relationship between the perpetrator and the victim is often a loophole that is used to commit violence, where the child loses control to protect himself. In addition, factors such as a lack of family supervision, the influence of the media that can normalize violence, and a lack of understanding of religious values also contribute to the occurrence of this crime.

D. The Legal Framework of Forced Child Intercourse under the Child Protection Act

Criminal acts are an act or act that is against the law and violates the prohibition in criminal law or the interests of others are threatened and sanctioned [21]. The criminal act of committing violence or threatening violence to force a child to have intercourse is an act of abuse of physical force that causes danger to a person's body, life and independence, including making others faint and helpless or unlawful acts in the form of speech, writing, images, symbols, or body movements, either with or without the

[20] Henting.

[21] Lishidayanti Dachi, "Analysis of Punishment for Children of Violent Crimes of Forcing Children to Have Intercourse," *JPH: Journal of Legal Arrows* 2, no. 1 (2023): 98.

use of means that cause fear and limit the child's independence so that he is forced to Up [22].

In essence, children cannot protect themselves against various kinds of mental, physical, and social threats in various areas of life. Therefore, a legal protection that favors the interests of children is needed. Legal protection of children in a family, society, and nation is a benchmark of national civilization for the development of human beings as a whole, so everyone is obliged to strive for the protection of children. As a form of protection for children in Indonesia, the lawmakers make laws, through legislation (positive law), such as the Criminal Code (KUHP), Law No. 23 of 2002 as amended by Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection.

Expressly in Article 15 of Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection states that every child has the right to receive protection from:

1. Abuse in political activities.
2. Involvement in armed disputes.
3. Involvement in social unrest.
4. Involvement in events that contain violent elements.
5. Involvement in wars.
6. Sexual crimes.

Sexual crimes are one of the crimes that really get special attention in the issue of child protection. This is clearly seen in

[22] Miftahul Faza and Mahfud, "Tindak Pidana Melakukan Kekerasan Atau Ancaman Kekerasan Memaksa Anak Melakukan Persetubuhan," *JIM Bidang Hukum Pidana* 7, no. 3 (2023): 332.

Article 15 of this law which provides firmness so that every child has the right to be protected from sexual crimes, the cause of which is the increasing number of crimes of sexual violence that befall children in Indonesia, because children are easily threatened and injured by perpetrators of sexual crimes to commit sexual violence considering that children are not able to resist or protect themselves from the dangers that will befall them [23].

In order to avoid the occurrence of crimes against children, especially sexual violence, Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection emphasizes and provides obligations and responsibilities to the State, Government, Regional Government, Community, Family and Parents or Guardians in the implementation of child protection as stipulated in Article 20 Chapter IV Obligations and Responsibilities and further in Articles 21-26 of this Law explain in detail the roles and duties of each State, Government, Regional Government, Community, Family, and Parents or Guardians in the implementation of child protection. There are several articles in the Child Protection Law related to this research as follows:

In Article 54 of Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection it is explained that:

Article 54 Paragraph (1): Children in and around educational units are obliged to receive protection from physical,

[23] I Putu Arya Pranata Karang, "Sanksi Pidana Bagi Pelaku Kejahatan Persetubuhan Yang Dilakukan Terhadap Anak Di Wilayah Hukum Polda Bali," *Jurnal Kertha Desa* 11, no. 5 (2023): 2346.

psychological, sexual crimes, and other crimes committed by educators, education staff, fellow educators, and/or other parties.

Article 54 Paragraph (2): Protection as intended in paragraph (1) is carried out by educators, education personnel, government officials, and/or the community.

Furthermore, in the case of children who are victims of sexual violence, in this case Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection provides special protection in terms of victim recovery as stipulated in Article 64A as well as the submission of compensation (restitution) against the victim directly which is borne to the perpetrator of sexual violence as regulated in Article 71D.

Article 81 of Law No. 17 of 2016 concerning Child Protection is formulated as follows:

1. Every person who violates the provisions as referred to in Article 76D shall be sentenced to imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp5,000,000,000.00 (five billion rupiah).
2. The criminal provisions as intended in paragraph (1) also apply to every person who deliberately commits deception, sets of lies, or persuades the child to have intercourse with him or with another person.
3. In the event that the criminal act as intended in paragraph (1) is committed by a Parent, Guardian, Child's Caregiver, Educator, or Education Personnel, the penalty shall be added to 1/3 (one-third) of the criminal threat as intended in paragraph (1).

The content of article 76 D is as follows: "Everyone is prohibited from committing Violence or the threat of Violence

forcing the Child to have intercourse with him or with another person."

Article 82 of Law No. 17 of 2016 concerning Child Protection is formulated as follows:

1. Any person who violates the provisions as referred to in Article 76E shall be sentenced to imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp5,000,000,00.00 (five billion rupiah).
2. In the event that the criminal act as intended in paragraph (1) is committed by parents, guardians, people who have family relations, childcare providers, educators, education personnel, officials who handle child protection, or is committed by more than one person together, the penalty is added to I 13 (one-third) of the criminal threat as intended in paragraph (1).

Based on this, it can be seen that sexual crimes against children are an issue that receives serious attention in the context of child protection, as regulated in Law Number 17 of 2016 concerning Child Protection. This law emphatically emphasizes the right of every child to protection from sexual crimes, which is on the rise in Indonesia. This increase in crime rates is caused by a variety of factors, including the inability of children to resist or protect themselves from the threat of perpetrators who are often adults or close relatives. In this case, children are easy targets because they do not have the capacity to be aware of the impending danger or to fight the perpetrator.

To prevent the occurrence of sexual violence against children, Law Number 17 of 2016 imposes clear responsibilities on all parties, including the state, government, society, family, and parents. The articles contained in this law, such as Article 20 which

regulates the obligations and responsibilities in the implementation of child protection, emphasize the active role of all elements of society in creating a safe environment for children. Article 54 specifically regulates the protection of children in the educational environment, emphasizing that children have the right to be protected from acts of violence, both physical and sexual, that can be committed by educators, education staff, and fellow students.

In addition, strict sanctions against sex offenders are regulated in Article 81 and Article 76D, which include the threat of imprisonment and significant fines. Article 81 states that the perpetrator who violates the provision is punishable by imprisonment of between five and fifteen years. This shows the commitment of the law to provide a deterrent effect and affirms that sexual violence against children will not be tolerated.

The Child Protection Law also provides special protection for children who are victims of sexual violence through recovery and restitution mechanisms. Article 64A and Article 71D explain the steps that must be taken to restore the psychological condition of the child and provide appropriate compensation from the perpetrator to the victim. Thus, child protection efforts are not only focused on prevention, but also on recovery and justice for victims.

E. Legal Arrangements Regarding Forcing Children to Have Sex According to the Child Protection Act

All forms of evil in Islam are the same, namely haram acts that are punishable. However, these crimes are diverse and different when viewed from the outside of the review. In this case, crime can be divided into several parts according to different perspectives on it, namely: First, in terms of the danger of crime

against the basic elements of society, it can be divided into the crimes of hudud, *qishas* and *ta'zir*. Second, in terms of the intent of criminal behavior, it is divided into two, namely intentional and unintentional. Third, in terms of the time it is revealed, it is divided into obscure evils and there is no ambiguity in it [24]. The size of a child can be said to have reached puberty if he already has one of the following traits, namely:

1. Have reached the age of 15
2. Has come out for boys
3. Dirty blood (*menstruation*) has come out for the daughter

This is in accordance with the words of the Prophet PBUH:

أَخْبَرَنَا عُبَيْدُ اللَّهِ بْنُ سَعِيدٍ قَالَ حَدَّثَنَا يَحْيَى عَنْ عُبَيْدِ اللَّهِ قَالَ أَخْبَرَنِي نَافِعٌ عَنْ ابْنِ عُمَرَ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَرَضَهُ يَوْمَ أُحُدٍ وَهُوَ ابْنُ أَرْبَعَ عَشْرَةَ سَنَةً فَلَمْ يُجِزْهُ وَعَرَضَهُ يَوْمَ الْخَنْدَقِ وَهُوَ ابْنُ خَمْسَ عَشْرَةَ سَنَةً فَأَجَازَهُ

Meaning: Narrated to us 'Ubaidullah bin Sa'id, he said, narrated to us Yahya from 'Ubaidullah, he said, narrated to me Nafi' from Ibn Umar that the Messenger of Allah صلى الله عليه وسلم proposed to him at the time of the battle of Uhud and he was fourteen years old, so he did not allow it, and he proposed to him at the time of the battle of Khandaq and he was fifteen years old, so he allowed it to.[25]

[24] Lyna Nazihud Dhahniya, "Tindak Pelaku Pemerkosaan Anak Dalam Pandangan Hukum Islam," *AHKAM* 7, no. 1 (2019): 52.

[25] Abd Allâh Muhammad Ibn Idrîs Al-Syâfi'i, *Al-Umm, Juz VII* (Beirut: Daar al-Wafa, 2005).

According to the jurists, the ability to think in children begins from the age of fifteen. If the child has reached that age, he is considered to be legally mature. Imam Abu Hanifah limits maturity to the age of eighteen; according to a history nineteen years for men and seventeen years for women. The popular opinion in the Maliki school is in line with that of Abu Hanifah because they set the age of adulthood at eighteen years and according to some others nineteen years[26].

Islamic criminal law does not provide a specific definition of rape in either the Quran or the hadith. In the book of Fiqh Sunnah written by Sayyid Sabiq classifies rape as forced adultery. While rape in Arabic is called *al wath'u* (*Al wath'u*) in Arabic means having sex or having sexual intercourse. *Bi al ikraah* (sexual intercourse by coercion). Meanwhile, the meaning of coercion in language is to lead people to something they don't like by force. Meanwhile, according to *fuqaha*, it is accompanying others to do something they do not like and there is no option for them to abandon the act[27].

In *fiqh, jinayah* rape is the occurrence of sexual relations between men and women in a forced state and occurs outside of a valid marriage and can be categorized as jarīmah zina. Meanwhile, according to Abdul Qadir Audah, quoted in his book At-Tasyri'al-

[26] Audah, *At-Tasyri' Al-Jinaiy*.

[27] Fitri Wahyuni, "Sanksi Pidana Pemerkosaan Terhadap Anak Menurut Hukum Pidana Positif Dan Hukum Pidana Islam," *Jurnal Media Hukum*, 2016, 103.

Jinaiy al-Islamiy, rape is a criminal act that is threatened with punishment because it can be interpreted as an act of adultery[28].

Moral crimes such as rape (adultery) are included in one of the categories of hudud jarimah. Hudud is etymologically the plural form of the word "*hadd*" limiting. *Hudud* in terms is a regulation or law from Allah that limits or prevents things that are permissible and forbidden (haram).[29] Where this *jarimah* is Allah's absolute right. The punishment for rapists is not only punished like adulterers, but also punished with ta'zir punishment as an additional punishment for coercion or threats made to facilitate the act of rape.

In Islamic criminal law, zina is divided into two, namely *zina ghair muhsan* and zina *muhsan*. With the following explanation:

1. Zina *ghair muhsan* is adultery committed by men and women who have not yet had a family. There are two types of punishment for zina ghair muhsan, namely punishment and exile. The punishment of abuse when a boy and girl commit an act of adultery, they are punished with a hundred lashes. This is targeted by the word of Allah in surah An-Nur verse 2 which reads [30]:

[28] Nur Fajri Istiqomah, "Tinjauan Hukum Pidana Islam Terhadap Sanksi Pidana Perkosaan Oleh Anak Di Bawah Umur (Studi Putusan Pengadilan Negeri Semarang No. 14 /Pid.Sus.Anak/2015/Pn Smg.)," *Universitas Islam Negeri Walisongo Semarang*, 2020, 22.

[29] Ahmad Hanafi, *Principles of Islamic Criminal Law* (Jakarta: Bulan Bintang, 1993).

[30] Hanafi.

اَلزَّانِيَةُ وَالزَّانِيْ فَاجْلِدُوْا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ ۖ وَّلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِيْ دِيْنِ اللّٰهِ اِنْ كُنْتُمْ تُؤْمِنُوْنَ بِاللّٰهِ وَالْيَوْمِ الْاٰخِرِ ۚ وَلْيَشْهَدْ عَذَابَهُمَا طَآئِفَةٌ مِّنَ الْمُؤْمِنِيْنَ

It means: "Adulterer and adulterer male, beat each of them a hundred times, and do not have mercy on them to prevent you from (performing) the religion of Allah, if you believe in Allah and the Day of Resurrection; And let their punishment be witnessed by some of the believers."

Punishment is *a punishment of had*, that is, punishment that has been found by the sharia'. Therefore, the judge may not reduce, add, postpone its implementation, or replace it with other punishments. In addition to being determined by sharia', punishment is also the right of Allah or the right of the community so that the government or individuals do not have the right to give forgiveness. The punishment of exile is the second punishment for zina *ghair muhsan* which is the punishment of exile for one year. According to Imam Abu Hanifah and his companions, the punishment of exile is not obligatory. However, they allow the imam to combine a hundred times dera and isolation when it is seen as maslahat. Thus, according to them, the punishment of exile is not a punishment of limit, but a punishment of ta'zir. This opinion is also the opinion of the Zaidiyah Shi'ah. The reason is because the hadith about the punishment of exile is abolished (di-mansukh) with surah An-nur verse 2.

2. Zina *muhsan* is zina committed by men and women who are already married (married/married). There are two types of

punishment for the perpetrator of adultery, namely a hundred times and stoning. Dera a hundred times is based on the Qur'an surah An-Nur verse 2 and the hadith of the Prophet that has been stated above, while the punishment of stoning is also based on the hadith of the Prophet both *qauliah* and *fi'liah*. The punishment of stoning is the death penalty by being stoned or the like. The punishment *of stoning* is a punishment that has been recognized and accepted by almost all the jury, except by a group of Azariqah from the Khawarij group, because they do not want to accept the hadith, except those that reach the level of mutawatir. According to them (Khawarij), the punishment for adultery, both muhsan and ghair muhsan, is the punishment of a hundred times based on the word of Allah in surah An-Nur verse 2.[31] Therefore, avoid the act of adultery which has been stipulated in the Quran in surah al-Isra verse 32:

وَلَا تَقْرَبُوا الزِّنٰٓى اِنَّهٗ كَانَ فَاحِشَةً ۗ وَسَاۤءَ سَبِيْلًا

Meaning: "And do not approach adultery; (adultery) is indeed an abominable deed, and a bad way."

As for the punishment for the perpetrator of rape, according to the majority of scholars, it is the punishment of an adulterer. If he is married, the punishment is in the form of stoning, and if he is not married, he is punished with 100 lashes and exile for one year. Some scholars oblige rapists to give dowry to women who are

[31] Hanafi.

victims of rape[32]. Then, Imam al-Baji continued, "The argument that we convey is that the punishment of the ḥadd and the dowry are the two obligations of the rapist, is that the punishment of the mahadd is related to the rights of Allah, while the obligation to pay the dowry is related to the rights of creatures[33]. In Islamic law, it imposes a sanction on the perpetrator of rape of a minor, a minimum of four male witnesses are required who are fair and based on valid evidence and the person who committed the act must confess frankly.

According to the term *Shari*', as stated by 'Abd al-Qadir 'Awdah, hudud jarimah is: [34]

جرائم الحدود هو الجرائم لمعاقب عليهابحد. والحد هو العقوبة المقد رة الحق تعالى

Meaning: *Jarimah hudud* is *a jarimah* that is threatened with the punishment of had. And the limit is the threat of punishment that has been determined in the kind and amount and is the right of Allah.

This *hudud* punishment is the right of Allah, which cannot be changed or replaced and cannot be changed. The hudud punishment cannot be forgiven by anyone. Those who violate the rules of Allah's law, which have been determined and decreed by Allah/His Messenger mentioned in the Qur'an or hadith are

[32] Istiqomah, "Tinjauan Hukum Pidana Islam Terhadap Sanksi Pidana Perkosaan Oleh Anak Di Bawah Umur (Studi Putusan Pengadilan Negeri Semarang No. 14 /Pid.Sus.Anak/2015/Pn Smg.)."

[33] Muhammad Jawad Mughniyah, *Al-Fiqh Al-Madzahib Al-Khamsah* (Jakarta: Lentera Basritama, 1996).

[34] Audah, *At-Tasyri' Al-Jinaiy*.

among the unrighteous. As Allah SWT says in surah al-Baqarah (2) verse 229 [35]. or surah at-talaq which means: ".... these are the laws of Allah, so do not transgress them. Whoever transgresses the laws of their Allah is the one who persecutes himself".

Based on the above explanation, it can be concluded that acts of sexual violence, especially forced intercourse in the perspective *of fiqh jinayah,* are interpreted as sexual relations that occur outside of a valid marriage by force, and are included in the category of jarīmah zina. According to Abdul Qadir Audah, forcing intercourse is considered a criminal offense that is threatened with the punishment of ḥadd, which is a form of sanction set by Allah. This criminal act falls under the category of hudud jarimah, which refers to Allah's regulations that limit prohibited acts and establish irreversible sanctions. In Islamic criminal law, zina is divided into two types, namely zina *ghair muhsan*, which is zina committed by unmarried individuals, and zina *muhsan*, which is committed by married individuals. The punishment for the perpetrator of adultery ghair muhsan includes 100 lasa and in some opinions a sentence of exile for one year. Meanwhile, the perpetrator of adultery will be punished with a hundred lashes and stoning, which is the death penalty by throwing stones. The punishment for perpetrators of forcible intercourse in Islamic law is in line with the punishment for adultery where married perpetrators will be subjected to stoning, while unmarried perpetrators will be punished with 100 lashes and exile. In addition, some scholars require the perpetrator to give dowry to the victim. And to impose a sentence or sanction, a minimum of four fair male witnesses is

[35] Zulkarnain Lubis and Bakti Ritonga, *Dasar-Dasar Hukum Acara Jinayah* (Jakarta: Kencana Prenada Media Grup, 2016).

needed, and the confession of the perpetrator is also very important.

F. Sitting in the case of Decision Number 714/Pid.Sus/2023/PN. Medan

Based on Decision Number 714/Pid.Sus/2023.PN. Medan, was found to be sitting as follows:

> On Thursday, October 6, 2022, at around 08.00 WIB, the RT witness entrusted his son, SPLL, to his in-laws on Jalan Sawit Raya No. 48, Mangga Village, Medan Tuntungan District, Medan City. This care was done because Witness Rita would take her sick brother to the hospital. About half an hour later, the in-laws asked Sarah to go home and get a plastic chair for her brother. When he returned home, SPLL was called by the Defendant who asked to buy mineral water. The defendant gave money to SPLL to buy two glasses of aqua, and after that, the defendant invited Sarah into the boarding room of Witness RN alias Udak.[36]
>
> In the room, the defendant locked the door and turned off the lights. Sarah saw Witness Ridwan sleeping. When Sarah's cousin came to pick up the plastic chair, Sarah hid behind the bedroom door. After the cousin left, the Defendant committed a very inappropriate act against Sarah by opening her pants up to her knees and placing the SPLL on her thigh. The defendant then had sexual intercourse with Sarah, which led to the release of semen in her body. After committing the act, the Defendant put his pants back on and slept next to Witness RN, while

[36] Mahkamah Agung Republik Indonesia, "714/PID. SUS/2023/PN MEDAN)" (2023).

SPLL also slept next to him. A few moments later, SPLL's aunt, RNTML's Witness, knocked on the door of the room, and Sarah immediately came out.

As a result of the Defendant's actions, SPLL experienced pain in his genitals. The results of the examination from the Dr. Pirngadi Regional General Hospital, which are contained in Visum Et Repertum Number: 283/VER/OBG/BPDRM/2022, stated that the hymen was not intact, with tears found on examination. This suggests that Sarah has been subjected to serious sexual abuse.

Based on these facts, the Panel of Judges considered that the Defendant IM alias ML had been proven to have committed a criminal act in accordance with Article 81 Paragraph (2) Jo. Article 76D of the Republic of Indonesia Law No. 17 of 2016 concerning Child Protection. In this case, there are two main elements that must be proven.[37] First, the Defendant as a legal subject who is able to take responsibility for his actions. The facts at the trial show that the identity of the Defendant has been checked and matched with the indictment, and no excuse was found to expunge his guilt. Second, the Defendant deliberately committed a ruse to persuade a child, in this case Sarah Putri Lestari Limbong, who is a minor, to have intercourse. This act is not only unlawful, but it also causes deep trauma to the victim and ruins his future.

The Panel of Judges considered that the Defendant's actions were very disturbing to the community and had a negative impact on the victim's psychology. In the trial process, the Defendant showed an attitude of not admitting his actions, which became an

[37] Indonesia.

incriminating factor. In addition, the Defendant's previous legal record also aggravated the consideration. Nonetheless, the Panel of Judges noted that the Defendant behaved politely during the trial, which could be considered a mitigating factor. Taking into account all the elements and factors that exist, the Panel of Judges concluded that the Defendant must be sentenced to a crime that is appropriate and commensurate with his mistake, in order to provide a deterrent effect and ensure justice for the victim and the community, in accordance with the provisions of the applicable law.

So based on that consideration, the decision of the Panel of Judges on the decision is as follows:[38]

1. Stating that the defendant IM Als. The aforementioned ML is legally and convincingly proven guilty of committing the criminal act of "Deliberately persuading a child to have intercourse with him";
2. Imposing a criminal sentence on the Defendant ISMAIL IM Als. ML therefore with a prison sentence of 7 (Seven) Years and a fine of Rp60,000,000.00 (Sixty million rupiah) with the provision that if the fine is not paid, it will be replaced with a prison sentence of 3 (Three) Months;
3. Stipulate that the period of arrest and detention that has been served by the Defendant be deducted entirely from the sentence imposed;
4. Stipulate that the Defendant remains in custody;
5. Charging the Defendant to pay a case fee of Rp5,000.00 (five thousand rupiah).

[38] Indonesia.

G. Analysis of the Child Protection Law and Islamic Criminal Law on the Act of Forcing Children to Have Sexual Intercourse Analysis of Decision Number 714/Pid.Sus/2023/PN. Medan

Decision number 714/Pid.Sus/2023/PN Mdn revealed a case of sexual crimes committed by IM, aka ML, against a minor named SPLL where the victim was 12 years old at the time of the incident. This incident occurred on October 6, 2022. In this case, IM, who is self-employed, took advantage of the situation to commit acts of violence and coercion against the victim. He invited the victim into the room under deceptive reasons, then forcibly had intercourse. The perpetrator has a position as an adult who is supposed to protect the child because he is a close relative of the victim, but instead becomes a perpetrator of the crime.

A decision is the result or conclusion of something that has been carefully considered and assessed which can be in written or oral form. There are also those who interpret the verdict as a fixed verdict (*deffinitief*) (Dictionary of Fockema Andreae Legal terms) [39]. The form of decision in this article is specific to criminal case decisions. Because the form of the case causes differences in the verdict. In civil cases, there are more types or forms of decisions than in criminal cases [40].

In Decision Number 714/Pid.Sus/2023/PN. Medan, the Medan District Court convicted IM of having committed the crime of forcing a child to have sex with him as the child's

[39] Leden Marpaung, *Asas-Teori-Praktik Hukum Pidana* (Jakarta: Sinar Grafika, 2016).

[40] Jonaedi Efendi, *Rekonstruksi Dasar Pertimbangan Hukum Hakim* (Depok: Pramedia Group, 2018).

parent/guardian. The victim's child is female and 12 years old, the defendant committed the crime of forcing his child to have sex with him. Of course, the victim's minor child will feel the negative impact as a result of the forced act of sexual intercourse carried out by his own biological parents, especially in psychological terms. The parent who was supposed to provide protection to his child even gave a sense of trauma and fear due to the threat of being killed if he reported the incident done by his own biological father to others. The definition of coercive act (*dwingen*) is an act that is directed at another person by suppressing the will of another person contrary to the will of the other person so that the other person accepts the will of the oppressor or is equal to his own will.

So, when analyzed using the Criminal Code, this action can be subject to articles 287, 288, 289 and 294 paragraph (1). However, because the victim is the biological child of the defendant who, according to the child protection law, is the responsibility of the parents to meet the needs of the child and provide protection for the child because of his status as a family, the more appropriate use is the child protection law as explained in article 81 (1) and (3) of law number 17 of 2016 concerning the second amendment to law number 23 of 2002 concerning Child Protection.

According to Article 81 of Law No. 17 of 2016, it is possible to punish anyone who deliberately either by force or by committing lies, deception and persuasion against minors under the age of 18 (eighteen) years to commit all acts that are contrary to the decency and honor of the child or victim and allow acts to be committed that are contrary to the morality and honor of the child by others.

For example, groping the victim's genitals or limbs, kissing the victim and so on[41].

The elements that must be fulfilled based on the formulation of Article 81 of Law No. 17 of 2016 Second Amendment to Law No. 23 of 2002 concerning Child Protection, then the elements that must be fulfilled in implementing sexual violence against children are:

1. There is violence or threats of violence.
2. There is a trick.
3. There is a series of lies.
4. There is persuasion.
5. Molestation with a child.

Article 81 is much more complete because it formulates several acts other than violence or threats of violence as a way to force a child to have sexual intercourse, namely by acknowledging the existence of other methods that can be used such as through deception, a series of lies or persuasion to persuade children to commit or allow obscene acts to be committed. If one of these methods is fulfilled and the child who is forced to have sex is still 18 years old or younger, then the perpetrator can be charged with this Article 81 [42].

In analyzing this decision, the author also conducted an interview with one of the judges at the Medan district court to find out clearly about the position of this decision Decision Number

[41] Nurjayadi, "Penerapan Hukum Tindak Pidana Pencabulan Terhadap Anak Di Bawah Umur (Studi Putusan Nomor 182 PID.SUS/2016/PN.SGM)," *Fakultas Syariah Dan Hukum UIN Alaudin, Makassar*, 2017, 37.

[42] Nurjayadi.

714/Pid.Sus/2023/PN Mdn. The results of the interview between the author and the judge named Syarizal Munthe are as follows:

> "At the Medan District Court, we can see several cases where children are involved both as victims and perpetrators in cases of forcing children to have sex. When the perpetrator is a close person, the punishment is usually more severe as stipulated in the Child Protection Law. This is because there are many factors that influence, such as environment, emotional closeness, religious values, and social associations. In my opinion, the protection of children at this time is quite good and in accordance with the Child Protection Law. The existence of rules about children dealing with the law shows that the state plays an important role in protecting children from psychological trauma due to violence. In the act of forcing children to have intercourse, we need to evaluate whether the victim's child can still live with his family or needs to be moved to a safer place. The state also seeks to provide protection for victims and ensure perpetrators, especially in cases of rape, receive appropriate punishment. In terms of Islamic law, the approach is also very firm. If the perpetrator is not married, the punishment is 100 lashes and exile. If the perpetrator is married, the punishment can be more severe, namely stoning to death. In Islamic law, there is no room for forgiveness in cases of coercion against children, which further emphasizes the importance of child protection and justice. So, both in positive law and Islamic law, there is a clear commitment to protect children from all forms of violence."

Based on the interview, the judge explained that the decision taken in the case of forcing children to have sex in Decision

Number 714/Pid.Sus/2023/PN Mdn is in line with the provisions of the Child Protection Law, especially when the perpetrator is a close person. The judge emphasized the importance of environmental factors, emotional closeness, and religious values in determining harsher sentences for perpetrators. He also explained the role of the state in protecting children from psychological trauma, as well as the need to evaluate the condition of children, both as victims and perpetrators. Thus, the judge's decision not only reflects strict law enforcement, but also a commitment to protect children's rights and create justice in society.

Decision Number 714/Pid.Sus/2023/PN Mdn explains the importance of implementing Article 81 of Law Number 17 of 2016 concerning Child Protection in the context of sexual crimes committed by IM perpetrators against minors, SPLL. In this case, IM as the perpetrator not only violated the law, but also betrayed his role as a parent/guardian who was supposed to provide protection and affection to the child.

Article 81 (2) specifically prohibits anyone who intentionally commits violence or deception to force a child to commit an obscene act. IM's action of inviting SPLL into the room on the grounds of deception, followed by coercion to have intercourse, clearly meets the criteria for violation referred to in the article. The elements of violence and deception contained in IM's actions show that he used his position as a guardian to exploit the victim's child which is a serious violation of children's rights.

By analyzing this problem using the perspective of the Child Protection Law, it can be understood that the judge's decision using Article 81 (2) is very appropriate. This article is designed to protect children from various forms of violence and exploitation,

and affirms that perpetrators, especially those who have guardianships, must be held legally responsible. In this case, the IM must not only account for its actions criminally, but also face social and moral consequences for having damaged the integrity and honor of the victim's child who should have been protected. Therefore, the judge's decision to impose a sentence under Article 81 (2) not only reflects law enforcement, but also affirms the commitment to protect children from harm emanating from those closest to them. This further emphasizes the importance of child protection in legal and social contexts, and encourages society to be more aware of the risks faced by children, especially in relationships with adults who are supposed to protect them.

In addition to being important to understand the positive legal review, we also need to dig deeper into the review of Islamic criminal law regarding the practice of forcing children to have sexual intercourse, as reflected in decision number 714/Pid.Sus/2023/PN Mdn. In this context, special attention must be paid because the victim is a minor and the perpetrator is a married adult, Muslim, and have a close relationship with the victim's child. Islamic criminal law imposes strict sanctions on perpetrators, which reflects a commitment to protecting the rights and dignity of children.

Based on the type, criminal acts committed by IM against SPLL are classified as zina muhsan, which is sexual relations committed by married people. In the context of Islamic criminal law, zina muhsan is considered a very serious form of offense, especially when the perpetrator is an individual who is supposed to be a protector and role model for the child. This action not only violates legal norms, but also moral and ethical values that are

upheld in religious societies. The punishment for the perpetrator of adultery is stoning or stoned to death, while if the perpetrator is not married (*ghairu muhshan*), he is punished with 100 lashes. As this refers to the following hadith.

عَنْ عُبَادَةَ بْنِ الصَّامِتِ رَضِيَ اللهُ عَنْهُ قَالَ قَالَ رَسُولُ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ خُذُوا عَنِّي، خُذُوا عَنِّي، فَقَدْ جَعَلَ اللهُ لَهُنَّ سَبِيلًا اَلْبِكْرُ بِالْبِكْرِ جَلْدُ مِائَةٍ وَنَفْيُ سَنَةٍ، وَالثَّيِّبُ بِالثَّيِّبِ جَلْدُ مِائَةٍ، وَالرَّجْمُ رَوَاهُ مُسْلِمٌ

It means: "It was narrated from 'Ubadah bin As-Shamit RA, he said: "The Messenger of Allah PBUH said: "Take the punishment of adultery from me, take the punishment of adultery from me, indeed Allah has made a way (new law) for Muslim women who commit adultery. A person who does not have a spouse (husband or wife) who commits adultery with a person who does not have a spouse is punished 100 times and exiled for a year, and a person who has a spouse (husband or wife) who commits adultery with a person who already has a spouse is stoned. (HR. Muslim)

But in some other hadiths it is said that *a muhshan* adulterer is also subject *to a whipping* limit of 100 times before being stoned. This is as illustrated in the 11 (eleven) hadiths narrated by Muslim, at-Turmuzī, Abū Dāwud, Ibn Mājah, Ahmad and al-Darumī, with the distribution of the number of hadiths according to the narrator as follows: Muslim as many as 2 hadiths, al-Turmuzī as many as 1 hadith, Abū Dāwud as many as 1 hadith, Ibn Mājah as many as 1

hadith, Ahmad as many as 5 hadiths, and al-Darumī as many as 1 hadith [43].

Regarding the imposition of two punishments for muhshan adulterers, namely 100 lashes and stoning, there are differences of opinion among scholars. Imam Ahmad ibn Hanbal, Isaac, Dāwud al-Dhahīrī and Ibn Mundzir are of the opinion that the adulterer of muhshan was whipped 100 times and stoned (according to the above hadith). Meanwhile, a number of scholars, including Imam Malik, the Hanafiyah and Shafi'iyah are of the opinion that adulterers with muhshan status do not need to be punished with whipping, but it is enough to be punished with stoning. Jumhur in this case adheres to the hadith narrated by Jabir bin Samurah [44]. namely: that the Messenger of Allah (saw) stoned Ma'iz bin Malik and did not mention the whipping (HR. Ahmad).

On the other hand, according to most scholars, the hadith that states that only the adulterer of muhshan is punished with stoning comes after the issuance of the hadith that states that there is a combination of the two punishments (whipping and stoning). In this position, the hadith that comes later becomes the repeal (nāsikh) of the hadith that came first. From these two analyses, it can be concluded that the stronger opinion to hold is that the limit against the adulterer of muhshan is only stoned, without being whipped again. This is also in accordance with the logic that states that if the purpose of punishment has been fulfilled with heavier

[43] Khairuddin, "Had Bagi Pezina Muhsan (Kajian Perbandingan Dalil)," *Media Syariah* 8, no. 1 (2021): 112.

[44] Al-Syaukani, *Nail Al-Authar* (Beirut: Dār al-Fikr, n.d.).

sanctions (stoning to death), then lighter sanctions (100 lashes) are no longer needed (al-tadakhul theory).

Jarimah zina is included in *uqubah hudud* or *had*, while the definition of *jarimah* zina is inserting male genitalia into the female genitalia without being based on the marriage bond. The sanctions for the perpetrators of adultery *are* very strict and clear in Islamic criminal law. If the perpetrator is proven guilty, the punishment that can be applied is stoning to death for the married. This reflects the commitment of Islamic law to uphold justice and protect society from actions that undermine morals and ethics. In addition to physical punishment, the perpetrator can also be subjected to social sanctions, which has an impact on his reputation and status in the community. The defendant was sentenced to hudud for fulfilling the elements *of the limit*, namely:

1. The defendant has violated the rules that have been set out in the Qur'an surah An-nur verse 2.
2. The defendant had committed adultery by inserting his genitals into the victim's witness's genitals, which should have been abandoned instead of being carried out.
3. If the defendant is mature enough or is no longer a minor, the defendant must be sentenced.

If the defendant IM gets forgiveness from the victim witness does not affect the punishment he will get, his punishment will still continue because the hudud jarimah of the punishment has been decreed by Allah in accordance with the Qur'an surah al-Baqarah (2) verse 229 and surah At-Talaq verse 1, but in this case the defendant did not get forgiveness and did not admit his mistake.

Then, for child victims, the punishment in Islamic criminal law must be returned to their parents. In Islamic criminal law, if a child

commits jarimah, the child does not receive punishment or uqubah according to the opinion of the scholars. This is based on the hadith of the Prophet, namely:

حَدَّثَنَا هُشَيْمٌ أَنْبَأَنَا يُونُسُ عَنِ الْحَسَنِ عَنْ عَلِيٍّ رَضِيَ اللَّهُ عَنْهُ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ عَنْ الصَّغِيرِ حَتَّى يَبْلُغَ وَعَنْ النَّائِمِ حَتَّى يَسْتَيْقِظَ وَعَنْ الْمُصَابِ حَتَّى يُكْشَفَ عَنْهُ

Meaning: Having narrated to us Hutsaim, narrated to us Jonah from Al Hasan from Ali (may Allah be pleased with him) I heard the Messenger of Allah صلى الله عليه وسلم say, "Lift the pen of three things; a small child until he reaches puberty, a person who sleeps until he wakes up and a sick person (crazy) until he recovers[45]."

So it is clearly stated in fiqh jinayah, a child is not a person who deserves punishment. Fiqh jinayah does not determine the type of punishment to educate a child that can be imposed on a young child. In fiqh, jinayah is known as the sanction of *ta'zir*[46]

If referring to the provisions of Article 81 paragraph (2) of Law Number 17 of 2016 concerning Child Protection, perpetrators who violate the provisions of Article 76D can be sentenced to imprisonment for a minimum of 5 years and a maximum of 15 years and a maximum fine of Rp5,000,000,000.00. In the case of Decision Number 714/Pid.Sus/2023/PN Medan, the defendant

[45] Imam Al-Mawardiy, *Al-Ahkam Al-Sultaniyyah Wa Al-Wilayat Al-Diniyyah* (Beirut: al-Maktab al-Islami, 1996).

[46] Sumardi Efendi, "Tinjauan Yuridis Terhadap Jarīmah Zina Oleh Anak Di Bawah Umur Menurut Hukum Positif Dan Fiqh Jinayah," *Jurnal Syarah* 8, no. 1 (2019): 131.

IM alias ML was sentenced to 7 years in prison and a fine of IDR 60,000,000.00. Legally, this decision is not contrary to the law because it is still within the limits of criminal threats. However, when viewed from the perspective of justice and child protection, the punishment is considered to have not had a maximum deterrent effect on the perpetrator, especially because his actions were committed against his own biological children who should be protected.

The facts in the trial showed that the victim was a 12-year-old child and suffered physical injuries and deep trauma due to the defendant's actions. The child not only suffers physically, but also experiences psychological distress that makes him afraid, introverted, and loses his enthusiasm for school. This condition should be the main consideration for judges in imposing heavier sentences. When the perpetrator is a biological parent, the violations committed are not only criminal, but also moral and social because they have destroyed the child's trust in the protective figure in his family. Therefore, the application of a maximum punishment of 15 years in prison is more appropriate to reflect a sense of justice and provide a real deterrent effect for perpetrators and the community.

The judge's consideration of the defendant's polite attitude at trial as a mitigating matter should also be criticized. A polite attitude cannot erase the severity of the victim's suffering, especially in cases involving blood relations between the perpetrator and the victim. In cases like this, justice for the victim should be the main focus, not consideration of the defendant's behavior in the courtroom. Severe punishment not only serves as a

retribution for the crime committed, but also as a warning to the community not to repeat similar acts.

From the perspective of Islamic criminal law, the defendant's actions substantially fulfill the elements of *zina muḥṣan*, namely sexual intercourse committed by a person who is legally married. In principle, a perpetrator of *zina muḥṣan* should be sentenced to stoning (*rajam*) as the gravest punishment prescribed in Islamic law. However, since one of the primary evidentiary requirements for establishing *zina* is the testimony of four eyewitnesses who directly observe the act, the imposition of the *ḥadd* penalty becomes practically impossible to enforce. Therefore, the judge should have applied the principle of *ta'zīr* with the highest level of aggravation (*ta'zīr al-quswā*). This approach is further justified because the perpetrator is a *maḥram* (father or uncle), which constitutes a double violation against moral integrity, family sanctity, and human dignity. Consequently, the application of *ta'zīr al-quswā*, such as the death penalty, life imprisonment, or financial compensation (*mahr al-mithl*) for the victim, better reflects the essence of justice in Islamic law while aligning with the objectives of positive law to provide maximum protection for child victims of sexual violence.

Thus, although the 7-year sentence is formally not wrong, substantially the verdict has not met the value of justice and protection of children. Seeing the severity of the impact experienced by the victim, the application of a maximum sentence of 15 years in prison will be more appropriate and proportionate. Strict punishment not only enforces the law, but also serves as a preventive measure to foster public awareness that sexual crimes

against children are serious offenses that cannot be tolerated in any form.

H. Conclusion

The regulation regarding the criminal act of forcing children to have sexual intercourse is stipulated in Article 81 of Law Number 17 of 2016 on Child Protection, which prescribes a minimum imprisonment of five years and a maximum of fifteen years, along with a maximum fine of five billion rupiahs for perpetrators who use violence, deceit, or persuasion against children. In Decision Number 714/Pid.Sus/2023/PN Medan, the defendant IM, who coerced his own biological child into sexual intercourse, was sentenced to seven years in prison under Article 81 paragraph (2). Although the verdict is legally consistent with the statutory provisions, it fails to substantively deliver justice to the victim, given the profound psychological and social consequences suffered by the child.

From the perspective of Islamic criminal law, the act committed by the defendant fulfills the elements of *zina muḥṣan*, which in principle carries the punishment of stoning. However, due to the evidentiary requirement of four eyewitnesses being nearly impossible to fulfill, the case should instead fall under the principle of *ta'zīr* with the highest degree of aggravation (*ta'zīr al-quswā*). As the perpetrator is a *maḥram* (father), Islamic law allows for the imposition of the death penalty, life imprisonment, or financial compensation (*mahr al-mithl*) to ensure justice and safeguard the victim's future.

This study concludes that the seven-year imprisonment imposed by the court neither aligns with the gravity of the crime nor fulfills the objectives of justice as recognized in both positive

law and Islamic criminal law. The findings emphasize the importance of harmonizing these two legal systems to ensure proportional punishment and child protection. The contribution of this study lies in offering a dual-perspective analysis that bridges statutory and Islamic legal reasoning in cases of child sexual violence. Nonetheless, this research is limited to normative legal analysis and has not yet examined empirical enforcement practices, which future studies could explore to provide a more comprehensive understanding of judicial consistency and victim recovery mechanisms.

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