

A Maqasid al-Shariah Evaluation of the Death Penalty for Child Sexual Crimes

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Article	Abstract
How to cite: Alon Maemanah, et al., 'A Maqasid al-Shariah Evaluation of the Death Penalty for Child Sexual Crimes' (2026) Vol. 7 No. 2 Rechtenstudent Journal Sharia Faculty of KH Achmad Siddiq Jember State Islamic University. DOI: 10.35719/rch.v7i2.425 Article History: Submitted: 07/03/2026 Reviewed: 15/03/2026 Revised: 07/04/2026 Accepted: 18/04/2026 ISSN: 2723-0406 (printed) E-ISSN: 2775-5304 (online)	Sexual violence, particularly sexual intercourse with children, is a serious crime that causes deep trauma, material and immaterial losses, and threatens the victim's future. In 2024, Indonesia recorded 8,674 cases. Children, as the weaker party, often become targets, so perpetrators are frequently given severe punishments, including the death penalty. In Islamic law, sexual intercourse with children is equated with the crime of <i>hirabah</i> because it forcibly violates a child's honor; therefore, harsh punishment, including death, is considered consistent with <i>maqashid syariah</i> in protecting religion, life, intellect, lineage, and property. This study examines the urgency of the death penalty for perpetrators of sexual intercourse with children, the characteristics of this crime, and the future concept of capital punishment within the framework of <i>maqashid syariah</i>. Using a normative juridical method with statutory, conceptual, case, and comparative approaches, the study finds that such acts violate the protection of life, intellect, and lineage, and therefore the death penalty is considered legitimate as protection, prevention, and public benefit, in line with Indonesian law and as a deterrent to this extraordinary crime. Keywords: <i>Death Penalty, Perpetrators of Sexual Intercourse, Maqashid Sharia.</i> Abstrak Kekerasan seksual, khususnya hubungan seksual dengan anak-anak, adalah kejahatan serius yang menyebabkan trauma mendalam, kerugian materiil dan non-materiil, serta mengancam masa depan korban. Pada tahun 2024, Indonesia mencatat 8.674 kasus. Anak-anak, sebagai pihak yang lebih lemah, sering menjadi sasaran, sehingga pelaku sering diberi hukuman berat, termasuk hukuman mati. Dalam hukum Islam, hubungan seksual dengan anak-anak disamakan dengan kejahatan hirabah karena secara paksa melanggar kehormatan anak; oleh karena itu, hukuman berat, termasuk hukuman mati, dianggap sesuai dengan maqashid syariah dalam melindungi agama, kehidupan, akal budi, keturunan, dan harta benda. Studi ini meneliti urgensi hukuman mati bagi pelaku hubungan seksual dengan anak-anak, karakteristik kejahatan ini, dan konsep hukuman mati di masa depan dalam kerangka maqashid syariah. Dengan menggunakan metode yuridis normatif dengan pendekatan hukum, konseptual, kasus, dan komparatif, penelitian ini menemukan bahwa tindakan tersebut melanggar perlindungan terhadap kehidupan, akal budi, dan keturunan, dan oleh karena itu hukuman mati dianggap sah sebagai bentuk perlindungan, pencegahan, dan kepentingan umum, sejalan dengan hukum Indonesia dan sebagai pencegah terhadap kejahatan luar biasa ini. Kata Kunci: <i>Pidana Mati, Pelaku Persetubuhan, Maqashid Syari'ah.</i>

Introduction

Sexual violence is a serious crime that can happen to anyone, both children and adults. However, the facts show that children, especially girls, are more vulnerable to becoming victims.¹ The impacts are not only physical, but also psychological, emotional, social, and even threaten the child's future.² Victims often experience deep trauma, fear, and a prolonged sense of insecurity. Sexual violence is also a social phenomenon that continues to evolve with diverse motives, methods, and intensities, creating unrest in society and threatening social order.³

In Indonesia, cases of sexual violence against children remain at an alarming rate. Data from the Ministry of Women's Empowerment and Child Protection and SIMFONI PPA recorded that in 2024, there were 14,193 reported cases of violence against children, with sexual violence accounting for the highest number, at 8,674 cases.⁴ One of the most devastating forms of sexual violence is sexual intercourse with children.⁵ This crime is generally committed by adults against children who are physically and psychologically in a weak position, making it easier for the perpetrator to carry out the crime.⁶ It is not surprising that some perpetrators were given very heavy sentences, including the death penalty.⁷

The death penalty, as a type of punishment in modern criminal law, has always been a source of debate. Internationally, the United Nations, through the 1948 Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), guarantees the right to life and promotes the abolition of the death penalty. Indonesia ratified the ICCPR through Law No. 12 of 2005. Subsequently, the Indonesian criminal law system has positioned the death penalty as a special and alternative punishment, no longer a primary punishment that must always be imposed.⁸

In the context of sexual violence against children, the death penalty is regulated in Article 81 paragraph (5) of Law Number 17 of 2016 concerning Child Protection. This provision has caused controversy because it is considered to be contrary to the principles of human rights as regulated in Article 28I of the 1945 Constitution and Law Number 39 of 1999 concerning Human Rights. The right to life is a right that cannot be reduced under any circumstances. On the other hand, there is a view that severe punishment, including the death penalty, is necessary to provide maximum protection for children as victims and to create a deterrent effect for perpetrators.⁹

¹ Shaffa Aulia Yasmin, dkk., "Inflicting Death Penalty to Sexual Offenders: A Comparison between Indonesia and Saudi Arabia", *ICLR*, Vol.4, Issue 1, 2021, 38

² Enggar Prasnatari, dkk., "Pertanggung Jawaban Pidana Pelaku Persetubuhan Yang Dilakukan Oleh Bapak Kandung Terhadap Anak Kandung", *Unizar Recht Journal*, Vol. 2. No. 3, 2023, 374

³ Melia Kantosa, dkk., "Pemberlakuan Pidana Mati Bagi Pelaku Tindak Pidana Kekerasan Seksual Terhadap Anak dalam Upaya Perlindungan Hak Anak," *Unes Law Review*, Vol. 6, No. 1, 2023, 1082

⁴ <https://www.detik.com/jatim/hukum-dan-kriminal/d-7651237/8-674-anak-di-indonesia-alami-kekerasan-seksual-sepanjang-2024/> accessed on November 25, 2024 at 11:00 WIB

⁵ A. A. Risma Purnama Dewi, dkk., "Tindak Pidana Persetubuhan Terhadap Anak Di Bawah Umur," *Jurnal Analogi Hukum*, Vol. 1, No. 1, 2019, 12

⁶ Fariaman Laia, "Tinjauan Yuridis Pidanaan Pelaku Tindak Pidana Persetubuhan Terhadap Anak", *Jurnal Panah Keadilan*, Vol. 2 No. 1, 2023, 71

⁷ Melia Kantosa, *op.cit*, 1083

⁸ Amelia Arief, "Problematika Penjatuan Hukuman Pidana Mati Dalam Perspektif Hak Asasi Manusia Dan Hukum Pidana," *Jurnal Kosmik Hukum*, Vol. 19 No. 1, 2019., 2

⁹ Muliawan, *Hukuman Bagi Pelaku Kekerasan Seksual Terhadap Anak*, <https://www.pn-palopo.go.id/30-berita/artikel/251-hukuman-bagi-pelaku-kekerasan-seksual-terhadap-anak>, accessed on February 19, 2025.

If linked to the concept of maqashid sharia, then imposing heavy punishment on perpetrators of sexual intercourse with children is seen as a form of protection for the five main objectives of sharia, namely protection of religion, soul, mind, descendants and property. Protecting children as part of the family is crucial because it concerns the continuation of generations. Therefore, strict punishment with a strong deterrent effect can be seen as part of the public good.

Research Method

The research method used is the Normative Juridical approach method which has the aim of discovering truth through coherence, namely, the conformity between legal norms, legal orders or prohibitions with a person's actions with legal rules and legal principles.¹⁰

Sources of legal material consist of primary and secondary data. Primary data is legal material that is authoritative or has authority because it is binding.¹¹ Secondary legal materials consist of books, dictionaries, journals, and commentaries on court decisions. Data collection techniques include library research that adapts the research approach, namely the legislative and conceptual approaches, to the legal problems or issues and theories related to the research.

Results and Discussion

The Urgency of the Death Penalty for Perpetrators of the Crime of Sexual Intercourse Against Children Based on Maqashid Syari'ah

The crime of sexual intercourse in the Criminal Code is contained in Article 287 Paragraph (1), which states that sexual intercourse is anyone who has sexual intercourse with a woman outside of marriage, knowing or should reasonably suspect that she is not yet fifteen years old, or if her age is not clearly known, that she is not yet ready to marry, is threatened with a maximum prison sentence of nine years. In conjunction with Article 288 Paragraph (1) of the Criminal Code which states that sexual intercourse is anyone who in marriage has sexual intercourse with a woman who he knows or should reasonably suspect that she is not yet ready to marry, if the act results in injury, is threatened with a maximum prison sentence of four years.¹²

This regulation was then annulled by Law No. 17 of 2016 concerning the Determination of Government Regulation in Lieu of Law No. 1 of 2016 concerning the Second Amendment to Law No. 23 of 2002 concerning Child Protection Article 76D which states that, "everyone is prohibited from committing violence or threats of violence to force a child to have sexual intercourse with him or with another person". Jo Article 81 Paragraph (1) which reads, "anyone who violates the provisions referred to in Article 76D shall be punished with imprisonment of at least 5 years and a maximum of 15 years and a maximum fine of five billion rupiah."¹³

Children who are victims of crime are those who lack the ability to fight the perpetrator because they are in a weak position. In cases of sexual intercourse, the victim is generally a woman who is naturally considered more vulnerable in protecting herself. Meanwhile, the perpetrator of sexual intercourse is a man who is physically stronger than the woman. Data

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum Cet Ke-14*, (Jakarta: Kencana, 2024) 43

¹¹ *Ibid*, 181

¹² Tim redaksi, *Kitab Undang-Undang Hukum Pidana* (Efata Publishing, cet V, 2018)

¹³ Copy of Law no. 17 of 2016 concerning the Stipulation of Government Regulations in Lieu of Law no. 1 of 2016 concerning the Second Amendment to Law no. 23 of 2002 concerning Child Protection

from the 2024 SPHPN and SNPHAR Surveys shows that the prevalence of violence against women and children in Indonesia is very high, with one in four women and one in two children having experienced violence. However, most cases are not recorded in the service system, such as Simfoni PPA which as of July 3, 2025, only recorded 14,039 cases, far below the survey findings.¹⁴

Practically, the death penalty is more urgent because of its incapacitation aspect, or eliminating the perpetrator's ability to repeat crimes, than simply its deterrent function, the effectiveness of which is still debated. Incapacitation means eliminating the perpetrator's ability to commit repeat crimes. The focus is not on instilling fear in others (deterrence), but on directly eliminating the potential danger from the same perpetrator.¹⁵ Perpetrators of child sexual intercourse often exhibit repetitive patterns or systematic behavior. Imprisonment alone does not always eliminate this risk, as there is a risk of recidivism after release. This is because perpetrators of sexual crimes are often driven by irrational psychological impulses, past trauma, or behavioral disorders that ignore legal risks. Therefore, relying on deterrence as the primary justification for the death penalty tends to be fragile and ineffective in practice.

A repeat offender's actions can be seen in a case in Mamasa Regency, West Sulawesi, where the crime of sexual intercourse with a sibling was committed repeatedly until the victim became pregnant. Based on decision No. 103/Pid.Sus/2020/PN Pol, the perpetrator, a 25-year-old laborer, was the older brother of the 16-year-old victim. The incidents occurred chronologically between late 2018 and January 2020. The criminal sentence under Article 81 Paragraphs (1) and (3) in conjunction with Article 81 Paragraphs (1) and (3) in conjunction with Article 81 Paragraphs (2) and (3) in conjunction with Article 81 Paragraphs (3) and (4) in conjunction with Article 81 Paragraphs (1) and (3) in conjunction with Article 81 Paragraphs (2) ... Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection Article 76D, with the demand to sentence the defendant to 20 (twenty) years imprisonment minus the time the defendant has been in temporary detention and a fine of Rp. 1,000,000,000,- (one billion rupiah) subsidiary to 6 (six) months imprisonment.¹⁶

To ensure justice for victims who have suffered physically, psychologically, and socially for life based on the function of incapacitation, the judge wants to impose the maximum sanction that not only punishes but also completely stops the possibility of the perpetrator repeating the act (because the victims are numerous and systematic). The sexual violence committed by the defendant in decision Number 86/PID.SUS/2022/PT BDG is the most serious crime, even by international legal standards. The impact is extraordinary, namely 13 child victims, 8 of whom are pregnant and suffer lifelong physical and psychological trauma, and the destruction of public trust in educational and religious institutions. The death penalty is considered more appropriate under incapacitation because it prioritizes aspects of justice and benefit¹⁷ and completely eliminate the risk of recidivism and provide maximum protection for society and children.

¹⁴ Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, *Menteri PPPA: Banyak Perempuan dan Anak Korban Kekerasan Tidak Berani Melapor*, diakses 23 Agustus 2025, <https://www.kemenpppa.go.id/siaran-pers/menteri-pppa-banyak-perempuan-dan-anak-korban-kekerasan-tidak-berani-melapor>

¹⁵ Miss Doris, "A Comparative Analysis of "Death Penalty" in Modern Criminal Law and Islamic Law," *Ladoke Akintola University of Technology Journal*, Januari 2025, 3.

¹⁶ Decision No. 103/Pid.Sus/2020/PN Pol

¹⁷ Warih Anjari, Nur Mailinda, "Penjatuhan Pidana Mati Kekerasan Seksual Terhadap Anak Dalam Persepektif Hak Asasi Manusia," *Yudisial*, Vol. 17, No. 2, Agustus 2024, 246

By paying attention to the formulation of Article 81 Number 17 of 2016 concerning Child Protection, it can be understood that the death penalty for perpetrators of violations of Article 76D of the Child Protection Law is one of the sanction options other than life imprisonment or imprisonment with a minimum term of 10 (ten) years and a maximum of 20 (twenty) years. This provision applies if the crime results in more than 1 (one) victim, causes serious injury, mental disorders, infectious diseases, impaired or loss of reproductive function, and/or results in the death of the victim, as stated in paragraph (5). Based on the provisions of Article 81 of the Child Protection Law, the death penalty can be imposed on perpetrators of sexual violence against children, but its nature is a form of aggravation of the sentence. The death penalty can only be imposed if the perpetrator of the crime regulated in Article 76D of the Child Protection Law meets certain conditions, such as there being more than one victim, the victim experiencing serious injury, the victim experiencing mental disorders, the victim suffering from an infectious disease, impaired or loss of reproductive function, and/or the victim dying.

The formulation of Article 81 paragraph (5) has the potential to cause problems in its application. This is due to the lack of clarity in the formulation regarding the conditions for imposing the death penalty, whether the aggravating conditions must be fulfilled cumulatively, that is, all six conditions must be present simultaneously for the death penalty to be imposed, or whether they are alternative, meaning that only one of the conditions is sufficient to allow the death penalty to be imposed. The formulation would be clearer if only the word "and" were used to indicate the cumulative conditions, or only the word "or" were used to indicate the alternative conditions. The use of the phrases "and" and "or" provides a stronger clarity of meaning than the phrase "and/or" which has both cumulative and alternative meanings.

In the framework of Maqashid al-syari'ah, according to al-Syathibi, Allah SWT revealed the syri'at (legal rules) to realize *maslahah* (general good) and avoid *kemafsadatan* (evil). To achieve a *maslahah*, the scholars divided it into three levels, first *al-dharuriyyat* (primary) namely everything that must exist for the establishment of human welfare, second *al-hajiyyat* (secondary) namely, a need that must also be owned by humans and its existence will make life easier and avoid difficulties, and third *al-tahsiniyyat* (tertiary) is, a human need to perfect something that he does and make it more beautiful and full of authority. In this case the forms of maintenance intended to realize a *maslahah* are maintaining the *maslahah* of *al-din* (religion), *al-nafs* (soul), *al-nasb* (offspring), *al-'aql* (reason), *al-mal* (property). The maintenance of these five main things is regulated clearly and firmly in Islamic law and for those who ignore or violate them, it is also regulated firmly accompanied by threats of heavy physical sanctions and the perpetrator is categorized as having committed a major sin.¹⁸

The crime of sexual intercourse with children generally violates three aspects of *al-dharuriyyat al-khams* in *maqashid al-syari'ah*, namely, protection of the soul (*hifz al-nafs*), protection of the mind (*hifz al-aql*) and protection of offspring (*hifz al-nasl*).¹⁹ The purpose of *hifz al-nafs* is to protect human life from all forms of threats such as murder, physical violence, to acts that injure or weaken life. *Hifz al-aql* (maintaining reason) is an obligation for humans as a difference from animals, by using reason humans can think to find a way out of their problems and various other functions of reason, while when someone does not maintain their

¹⁸ *ibid*

¹⁹ Netti Herawati, Abnan Pancasilawati, dan Maisyarah Rahmi, "Perlindungan Hak Anak Akibat Kekerasan Seksual di Pondok Pesantren Perspektif Maqashid al-syari'ah Syariah dan Hukum Positif," *Maqasid: Jurnal Studi Hukum Islam*, Vol. 12, No. 2, 2023, . 29–30.

reason then of course life is not as sweet as someone who has reason.²⁰ Therefore, humans are advised to maintain their common sense. If this provision is violated, it will result in the existence of human reason being threatened and will be subject to sanctions.²¹ Protecting descendants (hifz al-nasl), on the other hand, aims to protect the honor, dignity, and continuity of each generation.

Maqashid al-Shari'ah, in this case, must be understood as the public good, not merely a textual pretext. Maqashid al-Shari'ah is not merely upholding legal texts, but directing the law to achieve the common good. This means that the ultimate goal is to ensure security, social stability, and collective well-being, not simply to justify harsh punishment.²² Sexual intercourse with children damages the victim's future, both physically and psychologically, and contributes to fear in society. The threat of sexual predators disrupts social stability because parents lose their sense of security, and communities feel their environment is no longer protected.

The concept of *maslahah ammah* (public welfare) in the *maqashid al-syari'ah* (Islamic principles) concerns the collective interests of society, placing public interests above individual interests.²³ The imposition of the death penalty for perpetrators of sexual intercourse with child victims represents the state's commitment to protecting the nation's future generations and social security as its top priority, taking precedence over tolerance of perpetrators. This imposition aligns with the principle of *maslahah* (maslahah) because it brings greater collective benefit than upholding the rights of perpetrators of sexual intercourse that damages and disrupts public order.

The death penalty eliminates all of these negative possibilities because it eliminates the potential for escape, relapse, or negative impact on others. From a community perspective, this decision provides more comprehensive protection for society, especially for children as the next generation. The death penalty, in this case, is positioned as an instrument that not only protects the individual's life but also protects society at large from the threat of sexual predators. According to Gustav, laws that deliberately violate the principles of justice or equality lose their legal essence and cannot be recognized as law. This shows that laws that allow perpetrators of sexual violence against children to continue to have the potential to repeat their actions can actually be considered "flawed" because they fail to protect the rights of children as the most vulnerable group. Therefore, the death penalty must be understood as a form of legal correction to prevent it from losing its essence: maintaining substantive justice through victim protection. Therefore, the focus is on the collective interest, not merely textual compliance, which can create absolute certainty that perpetrators of sexual intercourse with children no longer have the opportunity to repeat the crime. Therefore, the law exists not only as a formal rule, but also as a concrete guarantee for society of self-protection and a sense of security.

In this context, the death penalty is positioned as a legal form that upholds certainty while providing objective justice by eliminating the potential threat of recurrence for perpetrators of sexual intercourse with children. The *Maqashid al-Shari'ah* framework provides a strong normative basis for assessing the urgency of the death penalty for perpetrators of sexual intercourse with children. This punishment is not merely a retributive sanction, but rather an

²⁰ Busyro, *Maqashid Syari'ah Pengetahuan Mendasar Memahami Maslahah* (Jakarta: Prenadamedia Group, 2019), 122-123.

²¹ *Ibid*, 123

²² H. Abdul Kadir, "Konsep Maslahah dalam Hukum Islam dan Implementasinya di Indonesia", *Jurnal Asy-Syariah*, Vol. 21, No. 1, 2019, 45.

²³ *Ibid*, 46.

instrument for safeguarding life and the continuity of generations. Strict enforcement against perpetrators ensures that the primary objectives of sharia are maintained while simultaneously providing a sense of security for the wider community.

Characteristics of the Crime of Sexual Intercourse Against Child Victims Which Can Be Punished with the Death Penalty

The characteristics of the crime of sexual intercourse with children which can be punished with the death penalty according to positive Indonesian law can refer to the provisions of Article 76D in conjunction with Article 81 paragraph (5) of Law No. 17 of 2016 concerning the Determination of Government Regulation in Lieu of Law No. 1 of 2016 concerning the second amendment to Law No. 23 of 2002 concerning Child Protection.²⁴ That based on Article 76D, every person is prohibited from using violence or threats of violence to force a child to have sexual intercourse, either with themselves or with another person. Furthermore, based on Article 81 paragraph (5), if the criminal act as referred to in Article 76D results in serious consequences, such as causing more than one victim, causing serious injury, mental disorders, infectious diseases, disruption or loss of reproductive function, and/or causing the victim to die, then the perpetrator can be subject to very severe punishment in the form of the death penalty, life imprisonment, or imprisonment for a minimum of 10 years and a maximum of 20 years.

The absolute theory view emphasizes that punishment is imposed solely as retribution for the crimes committed by the perpetrator.²⁵ The provisions in "Article 81 paragraph (5), if the criminal act as referred to in Article 76D results in serious consequences, then the perpetrator can be subject to a very severe punishment in the form of the death penalty, life imprisonment, or imprisonment for a minimum of 10 years and a maximum of 20 years", shows that the act is considered very reprehensible so that it deserves an appropriate punishment. Punishment here is more aimed at restoring the sense of justice that has been violated by the perpetrator, as emphasized by Kant and Hegel that punishment is a logical consequence and moral demand for the injustice that has been caused.²⁶

According to the combined theory which not only sees punishment as retribution, but also as a means to protect society.²⁷ The imposition of the death penalty on perpetrators "if the crime results in serious injury, mental illness, infectious disease, impaired or loss of reproductive function, and/or causes the victim's death" carries a deterrent message to prevent similar crimes from occurring in the future. Such punishment not only restores justice for the victim but also provides a deterrent effect, removes the threat of a dangerous perpetrator, and maintains public order. Therefore, the existence of the death penalty for perpetrators of sexual intercourse with children represents a balance between the demands of moral retribution and the need for social benefit.

The main elements of the crime regulated by Article 76D in conjunction with Article 81 paragraph (5) of Law No. 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the Second Amendment to Law No. 23 of 2002 concerning

²⁴ See Law No. 17 of 2016 on the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the second amendment to Law No. 23 of 2002 concerning Child Protection

²⁵ Bambang Poernomo, *Asas-Asas Hukum Pidana* (Jakarta: Ghalia Indonesia, 1985), h. 27

²⁶ *Ibid*

²⁷ M. Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana: Ide Dasar Double Track System Dan Implementasinya* (Jakarta: RajaGrafindo Persada, 2007), 10.

Child Protection are acts in the form of sexual intercourse with a child or victim under the age of 18, committed with violence or the threat of violence. This means that if the act is only limited to "persuading" or "seducing" as stipulated in Article 76E, then it is categorized as indecent assault, and does not fall into the category that could lead to the death penalty.²⁸

Aggravating consequences for the victim due to the perpetrator's actions, resulting in the perpetrator being threatened with the death penalty, are detailed in Article 81 paragraph (5) of Law No. 17 of 2016 concerning the Determination of Government Regulation in Lieu of Law No. 1 of 2016 concerning the second amendment to Law No. 23 of 2002 concerning Child Protection, which includes:²⁹

1. There is more than one victim.
2. The victim suffers serious injuries.
3. The victim suffers from a mental disorder.
4. The victim suffers from an infectious disease transmitted by the perpetrator.
5. The victim experiences impaired or loss of reproductive function.
6. The victim dies.

There are also certain circumstances that make the perpetrator's sentence heavier. However, these circumstances do not automatically mean that the perpetrator can be sentenced to death. Circumstances that increase the punishment for perpetrators of sexual intercourse with children are regulated in Article 81 paragraph (3) and paragraph (4) of Law No. 17 of 2016 concerning the Determination of Government Regulations in Lieu of Law No. 1 of 2016 concerning the second amendment to Law No. 23 of 2002 concerning Child Protection which classifies the categories of perpetrators who can be subject to additional punishment, namely if the perpetrator is a parent, guardian, or close relative of the child, educator, education personnel, caregiver, official, or person who has a special position, does it together (more than one perpetrator / collective), and the perpetrator is a recidivist (has been convicted of a similar case before).³⁰

The above categories result in the sentence being imposed being increased by one-third of the principal sentence. If the victim has experienced serious consequences as stipulated in Article 81 paragraph (5) of Law No. 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the Second Amendment to Law No. 23 of 2002 concerning Child Protection, and additional aggravating circumstances as stipulated in Article 81 paragraphs (3) and (4), the judge may still choose the death penalty, and these aggravating circumstances can strengthen the grounds for imposing the death penalty.

The development of the Indonesian legal system also seeks to eliminate all forms of crimes against sexuality with the enactment of Law No. 12 of 2022 concerning Crimes of Sexual Violence. The TPKS Law focuses more on adding types of sexual violence crimes, such as non-physical sexual harassment, sexual exploitation, and forced contraception. It regulates victims' rights such as restitution, rehabilitation, legal assistance, and recovery. It also introduces

²⁸ Robert Ariesta, Dwi Putri Melati, dan Lenny Nadriana, "Analisis Kriminologi terhadap Pelaku Tindak Pidana Pencabulan yang Dilakukan oleh Korban Anak", *Posita: Jurnal Hukum Keluarga Islam*, Vol. 2, No. 2, Desember 2024, 68.

²⁹ Law No. 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the second amendment to Law No. 23 of 2002 concerning Child Protection

³⁰ Rahmat Firdaus Libahongi, "Pertanggungjawaban Pidana Anggota Polri dalam Kasus Pemerkosaan Anak di Bawah Umur," *National Journal of Law*, Vol. 8, No. 2, September 2024, 213.

additional penalties such as announcing the perpetrator's identity, chemical castration, installation of electronic detection devices, and rehabilitation.³¹

Article 16 paragraph 3 of the TPKS Law contains a clause stating that additional penalties do not apply if the perpetrator is sentenced to death or life imprisonment. This means that the TPKS Law does not eliminate or abolish the death penalty provisions already in the Child Protection Law. This confirms that the legal source of the death penalty for child sexual intercourse remains based on the UUPA to accommodate cases of child sexual intercourse with serious consequences for the child victim, as stipulated in Article 81 paragraph (5) of Law No. 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the Second Amendment to Law No. 23 of 2002.

The imposition of the death penalty on a perpetrator must also meet the requirements of having more than one victim, as proven through the consolidation of case files and a repeated pattern of actions, as well as the perpetrator's status as a non-child. If the perpetrator is still a child, then under the SPPA Law, the maximum penalty is only 10 years in prison.

Meanwhile, according to the perspective of maqashid sharia, the actions carried out by Herry Wirawan violated 4 (four) basic maintenance in al-dharuriyat, namely: first, protection of religion (al-din), that HW's actions using religious symbols, namely Islamic boarding schools, can damage the image of Islam. Second, damaging protection of the soul (al-nafs), resulting in the victim experiencing damage to the reproductive organs due to the physical unpreparedness of the victim's child to become pregnant and give birth. Third, reason (al-aql) in the crime of sexual intercourse with children committed by HW resulted in many child victims experiencing psychological disorders, namely often feeling fear and prolonged trauma. Fourth, offspring (al-nasb), with many child victims who became pregnant and gave birth, resulting in unclear lineage of the children born to the child victims. As adherents of the Shafi'iyah school of thought emphasize "when a child is born as a result of adultery and his biological father asks for a determination of the lineage of the child resulting from adultery, then in this condition the child resulting from adultery cannot be assigned to the man who committed adultery even though he admits his adultery and asks for a determination of his lineage"³² This strengthens the imposition of the death penalty for perpetrators of sexual intercourse with children in order to protect the public interest.

Violations of the dharuriyyat hifz al-nasl (protection of offspring) include forced pregnancy, which cuts off the victim's control over reproduction, loss of reproductive function, which deprives the victim of the biological right to have children, or the act constitutes incest, which damages the lineage and disrupts the family structure. Violations of the dharuriyyat hifz al-din (religion) include rape, which contradicts the principles of moral purity and the teachings of sharia, and violations of the dharuriyyat hifz al-ird (honor/nobleness) involve sexual assault, which deprives the victim of their dignity through violence. When the violations committed by the perpetrator fulfill the cumulative violations of the maqashid al-syari'ah principles, for example violence and causing serious consequences or death and the perpetrator's behavior is serial or repeated and creates fear for the community, many jurists view it as approaching the

³¹ Setyo Utomo, Sri Ayu Septinawati, Sy Muhammad Ridho Rizki Maulufi Alkadrie, dan Weni Sentia Marsalena, "Pidana Bagi Pelaku Kejahatan Seksual Anak: Analisis Undang-Undang Nomor 12 Tahun 2022," *Jurnal Kolaboratif Sains*, Vol. 7, No. 12, Desember 2024, 4528.

³² Deni Purnama, Dhiauddin, "Islam dan Perlindungan Hak Anak: Tinjauan Fikih Terhadap Nasab Anak di Luar Nikah," *Al-Maslahah*, Vol. 12, 2024, 48

deprivation of public security and not just ordinary adultery, so that in such conditions, ta'zir bi al-qatl can be justified for the sake of maslahah and prevention.

Based on the theory of the purpose of punishment, the threat of the death penalty for perpetrators of child sexual intercourse aligns with the absolute theory. This theory emphasizes that "punishment is solely aimed at providing retribution for the crime committed".³³ Sexual intercourse with a child is clearly a disgraceful act, contrary to moral norms, and causes serious suffering for the victim, so that the death penalty is seen as appropriate retribution as well as restoring moral justice in society.

The Formulation of the Death Penalty for Perpetrators of the Crime of Sexual Intercourse Against Children Based on Maqoshid Syari'ah in the Future

The regulation of the death penalty formulation policy is a crucial need for the Indonesian nation. This is particularly related to efforts to formulate a future death penalty policy within Indonesian criminal law to align with the social, legal, and philosophical values entrenched in Indonesian society. This effort is being undertaken through reforming national criminal law. Criminal law reform in Indonesia is directed through the preparation of a new Draft Criminal Code (RUU KUHP) as the aspired criminal law (*ius constituendum*), rather than simply continuing the legacy of colonial law. This is based on the fact that the values embraced by Dutch criminal law during the colonial period, such as liberalism, non-religiosity, racial discrimination, absolute respect for human rights, individualism, and rigid state absolutism, are inconsistent with the values of Indonesian national identity. Instead, the Indonesian nation upholds the values of divinity, mutual cooperation, respect for the public interest, and the principle of deliberation for consensus.³⁴

The process of reforming criminal law through the Draft Criminal Code (RUU KUHP) has been ongoing for several years, until finally in January 2023, the Draft Criminal Code was passed into law as the new KUHP, which is planned to come into effect in 2026. In the new KUHP, the provisions regarding the death penalty have undergone fundamental changes. The death penalty is no longer placed as a primary punishment as in the Dutch legacy KUHP, but rather is made an alternative punishment that can only be imposed for certain crimes as stipulated in the law. This provision is emphasized in Article 98 of the new KUHP, which states that the death penalty is a last resort taken to protect and serve the community.³⁵

The regulation of the death penalty as the principal punishment in the Indonesian criminal law system continues to generate debate within the framework of national legal ideals. This is because the current Criminal Code (KUHP) is a legacy of Dutch law, which was implemented in Indonesia in January 1981 and still includes the death penalty. In fact, the Netherlands itself had abolished the death penalty in 1970 and completely abolished the death penalty for all types of crimes in 1982. According to Prof. Dr. Barda Nawawi Arief, the regulation of the death penalty, which was removed from the category of principal punishments and placed as a special, alternative punishment in the Draft Criminal Code, is based on three main considerations. First, viewed from the purpose of punishment, the death penalty is essentially not the primary means of regulating, disciplining, and improving individuals or

³³ Bambang Poernomo, *Asas-Asas Hukum Pidana* (Jakarta: Ghalia Indonesia, 1985), 27

³⁴ Rori Anugrah, Raja Desril, , "Kebijakan Formulasi Pidana Mati Dalam Pembaharuan Hukum Pidana Indonesia", *Jurnal Pembangunan Hukum Indonesia*, Volume 3, Nomor 1, 2021, 82.

³⁵ *ibid*

society, but rather only as a means of exception. Therefore, the death penalty is seen as a last resort (*ultimum remedium*), which is analogous to amputation or surgery in the medical world, which is not the primary treatment (*primum remedium*).³⁶

Second, the concept of the death penalty as a special punishment is based on the idea of monodualistic balance, namely the balance between the interests of protecting society and protecting the individual. Within this framework, in addition to serving to protect society, the regulation of the death penalty also takes into account individual rights, including provisions for postponing the execution of the death penalty for pregnant women and those with mental disorders, as well as the implementation of the conditional death penalty with a ten-year probationary period. Third, the retention of the death penalty, even as a special punishment, also aims to prevent the emergence of demands or reactions from the public that are retaliatory or extralegal executions. Thus, the existence of the death penalty in the law is intended as a means of controlling emotions and social reactions in society.³⁷

In principle, the death penalty does not conflict with the right to life guaranteed by the 1945 Constitution, because the Indonesian constitution does not adhere to absolute principles in human rights. The human rights stipulated in Articles 28A to 28I, Chapter XA of the 1945 Constitution are still limited by Article 28J. This article states that every human right must be exercised with respect for the rights of others in order to create public order and social justice. Therefore, the implementation of the death penalty, carried out with strict evidence and examination, and taking into account the security and order of society, once again does not conflict with just and civilized humanitarian values. Conversely, if the death penalty is not carried out for violations that have been legally proven, it can actually ignore the sense of justice and the protection of human rights.³⁸

As a comparison, Archbishop Desmond Tutu wrote "There is No Justice In Killing In The Name Of Justice" which means "There is No Justice In Killing In The Name Of Justice" Desmond's writing is on the official website of the Indonesian National Human Rights Commission, as an actualization of the institution in the form of literacy to respond to the issue of the death penalty which is a major concern for the National Human Rights Commission. Commissioner for Studies and Research of the Indonesian National Human Rights Commission Sandra Moniaga when speaking at the Parahyangan University Human Rights Guest Lecture entitled The Phenomenon of the Death Penalty in Indonesia from the Perspective of Law and Human Rights virtually, Rejecting the death penalty is based on the view that the punishment violates two important aspects of human rights, namely the right to life and the right to be free from torture. This is considered inconsistent with the principles of human rights, humanitarian values, and Pancasila. The right to life and the right not to be tortured are absolute human rights (non-derogable rights) and cannot be reduced under any circumstances. These rights are also constitutional rights as regulated in Article 28I of the 1945 Constitution.³⁹

Every person has dignity, the basic right to protection and every person is also very likely to make mistakes but there is an opportunity to correct those mistakes. Here the room for

³⁶ *Ibid*

³⁷ Ajie Ramdan, Rully Herdita Ramadhani, dan Mei Susanto, "Kenijakan Pidana Mati Dalam RKUHP Ditinjau Dari Aspek Politik Hukum Dan Ham", *Jurnal Arena Hukum*, Volume 11, Nomor 3, 2018, 605.

³⁸ *Ibid*.

³⁹ Archbishop Desmond Tutu, "There is No Justice In Killing In The Name Of Justice" Komnas HAM RI, 2022. <https://www.komnasham.go.id/index.php/news/2022/6/6/2144/realita-hukuman-mati-dari-perspektif-ham.html>, accessed October 28, 2025

the State to give punishment for someone to improve himself. However, on the other hand the State also provides limits to guarantees for the protection of Human Rights in Article 28J Paragraph (1) of the 1945 Constitution which states that, "everyone is obliged to respect the human rights of others in orderly life in society, nation and state", and Paragraph (2) "in exercising their rights and freedoms, every person is obliged to submit to the restrictions established by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security and public order in a democratic society". And that means the state still provides limits for someone who has violated the basic human rights of someone who has injured or damaged the dignity and honor of someone and caused unrest in society, then that person must receive punishment in accordance with the provisions stipulated in the Law.

Based on the above dimensions, not all cases of child sexual intercourse are automatically punishable by death, as the death penalty must meet a threshold (minimum limit). Based on the *maqashid al-shari'ah* (the principle of Islamic law), two interests must be considered: first, the public interest (public interest) to protect society from child predators and to safeguard the security, well-being, and well-being of future generations. Second, the right to life of the individual, where the perpetrator retains guaranteed human rights, including the right to life. From the perspective of the victim and society, if the damage caused falls into the category of a violation of the *dharuriyyat* (soul, mind, and offspring), then the imposition of the death penalty is considered proportional. However, if it is still in the mild category, for example, without permanent trauma, damage to reproductive organs, or damage to the future of the child victim as a future generation of the nation, then the application of the death penalty becomes disproportionate. From the perspective of the perpetrator, the right to life is a basic right. Limiting it is only permissible if there is true necessity (*darurah*) and *maslahat ammah* (public interest).⁴⁰

The death penalty can only be imposed if the crime committed is not merely a common offense, but falls into the most serious category, as it damages the foundations of a child's life. Examples include sexual intercourse resulting in death, or permanent psychological trauma that prevents the child from living a normal life. The death penalty can be imposed on perpetrators whose actions threaten at least three of the necessities of life (*maqasid sharia*): violations of the right to self-determination (*hifz al-nafs*), right to reason (*hifz al-aql*), and right to *nasl* (*hifz al-nasl*).⁴¹

Conclusion

The urgency of the death penalty for perpetrators of sexual intercourse with children is to provide protection for the most vulnerable group, namely children as the nation's generation and to protect the aspects of protection in the *maqashid sharia*, namely *hifz al-nafs* (protection of the soul), *hifz al-aql* (protection of reason), and *hifz al-nasl* (protection of offspring). Therefore, the death penalty for perpetrators has an urgency as Incapacitation or eliminating the perpetrator's ability to repeat the crime and breaking the chain of crime in order to maintain

⁴⁰Rangga Abdi Ramadhan, Athifatul Wafiroh, dan Cecep Soleh Kurniawan, "Penerapan Hukuman Mati di Indonesia Perspektif Maqasid al-Shari'ah," *Ma'mal: Jurnal Laboratorium Syariah dan Hukum*, Vol. 5, No. 1, Februari 2024, 41.

⁴¹Rangga Abdi Ramadhan, Athifatul Wafiroh, dan Cecep Soleh Kurniawan, "Penerapan Hukuman Mati di Indonesia Perspektif Maqasid al-Shari'ah," *Ma'mal: Jurnal Laboratorium Syariah dan Hukum*, Vol. 5, No. 1, Februari 2024, 41.

the welfare of the community or the public good, providing more comprehensive protection for society, especially for children.

The characteristics of the crime of sexual intercourse against child victims that can be threatened with the death penalty, if the victim is more than one person, the victim suffers serious injuries, mental disorders, suffers from an infectious disease transmitted from the perpetrator, the victim experiences loss of reproductive function, the victim dies. Meanwhile, according to the concept of maqashid al-syari'ah, it is when the perpetrator's actions violate *ad-dharuriyyat* (everything that must exist for the upholding of human welfare) cumulatively, namely, *hifz al-nafs* (protection of the soul), *hifz al-aql* (protection of reason), *hifz al-nasl* (protection of lineage), *hifz al-din* (protection of religion). So these elements are the basis for a perpetrator to be sentenced to death as an effort to bring substantive justice, legal certainty, and the benefit of society, in accordance with the principles of positive Indonesian law and the objectives of sharia.

The concept of the death penalty for perpetrators of sexual intercourse with children is carried out by a firing squad by shooting to death, the implementation is carried out in public, it cannot be imposed on children under 18 years of age, the implementation of the death penalty for pregnant women or people with mental disorders, is postponed until the woman gives birth or the mentally ill person recovers, and can be carried out if a pardon is rejected and approved by the president, the implementation of the death penalty can be postponed with a 10-year probationary period. In terms of the concept of maqashid sharia, the death penalty can be implemented in accordance with the principle of public welfare as the main objective of Islamic sharia.

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