

BOOK IV  
ISLAMIC LAW AND GLOBALIZATION



UNIVERSITAS ISLAM SUMATERA  
UTARA



**IC-GLOW  
2017**

DOCTORAL DEGREE UNS  
FACULTY OF LAW

# PROCEEDING

THE 2017  
INTERNATIONAL CONFERENCE ON  
GLOBALIZATION OF LAW  
AND LOCAL WISDOM

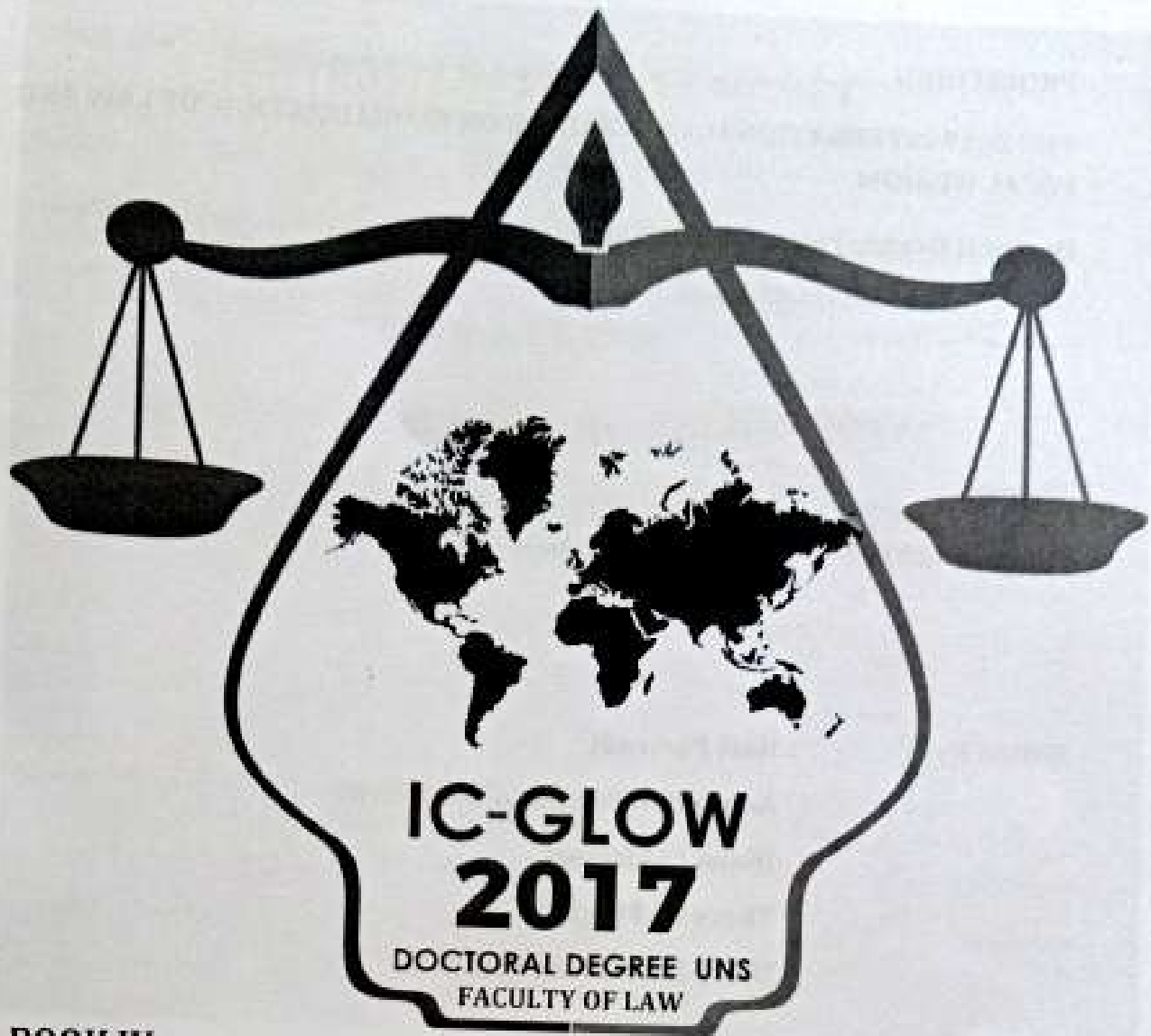
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*DOCTORAL DEGREE OF LAW STUDIES 2016*  
*FACULTY OF LAW, UNIVERSITAS SEBELAS MARET SURAKARTA*  
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# PREFACE

The 2017 International Conference on Globalization of Law and Local Wisdom (IC-GLOW 2017) UNS, held in Surakarta from Oktober 14-15 Oktober 2017, with an overacting conference theme of "Globalization of Law and Local Wisdom". This theme was developed due to law condition nowadays that increasingly blurred in practice because there is a differences between state law and international law.

This proceedings from the conference provides multiple meanings of the term sustainability that divided into four panels, namely National Law and Globalization; Local Wisdom and Bussiness Law in An Era of Globalization; Penal Law and Globalization; Islamic Law and Globalization. There were two plenary sessions covering the difference areas of the conference : Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, S.H., M.M. (Universitas Sebelas Maret); Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D (Universitas Indonesia); Prof. David Keith Linnan (USC School of Law South California); Dr. Mohd. Iqbal bin Abdul Wahab (International Islamic University Malaysia, Malaysia); Prof. Dr. Thomas Schmitz (Universität Göttingen, Germany & the Hochschule des Bundes für öffentliche Verwaltung, Brühl, Germany); Prof. Seok Woo Lee (Inha University of Law South Korea); Prof. Dr. H. Abdul Mohaimin bin Noordin Ayus (University Islam Sultan Shahrir Ali, Brunei Darussalam); Christoper Cason, JD (Seattle Pacific, Wasingthon DC-US & Universitas Islam Indonesia, Indonesia).

These public talks, respectively, were very accesible to general audience. The conference participants came from various background such as researcher, lecturer, practitioner, and college students as well. The first day before conferenceprograme was started by a special gala dinner to honor all of distinguished guests, invitation, and participants.

The selected paper that were presented on the conference program formed the heart of the conference and provide ample oppurtunity for discussion. Of the total number of presented papers, all papers that split into four panels sub theme are included in this proceedings. We would like to thanks to the committee who were facing the challenge during the conference to achieve the aims of the events. All in all, the IC-GLOW 2017 was successful and we expect this proceeding could be useful for entire scholar.

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## The 2017 International Conference on Globalization of Law and Local Wisdom



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# ISLAMIC LAW PERSPECTIVE ON THE CASTRATION PUNISHMENT FOR THE PERPETRATORS OF SEXUAL VIOLENCE AGAINST CHILDREN<sup>1</sup>

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## Abstract

The increasing cases of sexual violence that occurred today, from various cases of sexual violence against children, indicate the need for special protection for of children as victims of sexual violence. The issuance of Law No. 1/2016 as the amendment to Law No. 35/2014 on Child Protection is a government effort to reform the law which aims to guarantee the fulfillment of children's rights in order to grow, develop and participate optimally, according to the prestige and dignity of humanity and get protection of any violence. The existence of this law should prevent and minimize the sexual violence cases against children. However, the government needs to re-examine the provision of additional punishment which is considered violating human rights and is not in accordance with Islamic Shari'a. The problem identifications raised and given the answers in this paper are (1) How is the perspective of Islamic law on emasculated punishment for the perpetrators of sexual violence against children? and (2) How is the implementation of the emasculated punishment for the perpetrators of sexual violence against children in Indonesia? The approach method used in this study is the normative juridical approach, with secondary data as the source. The results of this study showed that (1) the emasculated punishment violates the Islamic Sharia. Therefore, it is forbidden for three reasons, namely: a) Islamic Sharia has explicitly prohibited emasculated punishment without any dissenting opinion (khilafiyah) among fuqaha, b) Islamic Sharia has set penalty for perpetrators of sexual violence that commits acts of obscenity and rape according to the details of the action facts; therefore, it may not (haram) carry out any kind of punishment unless the provisions of Islamic Sharia, c) the method of emasculated punishment used was the chemical injection, i.e. estrogen hormone is injected, in addition, it is

<sup>1</sup>Lembaga Pengelola Dana Pendidikan (LPDP) as the sponsor of this study

also prohibited (haram). Because it will lead to emasculated men have feminist physical characteristics. In fact, Islam has forbidden men to resemble women or vice versa. (2) The implementation of emasculated punishment for the perpetrators of sexual violence against children in Indonesia shall be regulated in Law No. 1/2016 on Child Protection, but there are pros and cons about the emasculated punishment for perpetrators of sexual violence against the children.

**Keywords:** Islamic Law, Emasculated Punishment, Perpetrators of sexual violence

## A. INTRODUCTION

Child is the next generation in the future. Either the good or the bad future of the nation depends also on the good or the bad condition of the child today. Regarding to this case, the treatment of children with a good way is our duty, so that they can grow well and become the bearers of civilization's treatise. Article 16 (3) General Declaration of Human Rights suggests that the family is the unity of the natural and fundamental of society and is entitled to protection by society and state. The declaration is an instrument of international human rights that is universal, in a sense that each right set forth there in shall be applicable to all mankind in the world with no exception. In Law No.3s9/1999 on Human Rights, 15 articles are formulated specifically on the rights of children, since the law makers realize that children are vulnerable to human rights violations. This is in accordance with the ratification of Convention on the Rights of the Child by Presidential Decree No. 36/1990 on Ratification of the Convention on the Rights of the Child; by doing so, since 1990, Indonesia is legally bound to carry out the provisions set forth in the Convention on the Rights of the Child<sup>2</sup>.

The convention sets out the general principles of the protection of children namely: non-discrimination, the best interests of the child, children survival and development, and appreciation of children participation<sup>3</sup>. Despite the Child Protection Act has been issued and until at the moment, the well-being and

<sup>2</sup>Nasir Djamil, 2015, *Anak Bukan Untuk Dihukum catatan Pembahasan UU Sistem Peradilan Pidana Anak (UU-SPPA)*, Sinar Grafika, Jakarta Timur, p. 18

<sup>3</sup>Rika Saraswati, 2015, *Hukum Perlindungan Anak Di Indonesia*, Citra Aditya Bakti, Bandung, p. 1



fulfillment of children's rights are still far from the expected. This can be seen from the recurrences of sexual violence against children.

The increasing cases of sexual abuse of children at this time, referred to the number of cases of sexual violence that occurred in 2014-2016, such as:

- a. Case of AS (24 years) alias Emon who is called sexual predator seeking children for sodomy. Sexual violence committed by AC reached 73 people<sup>4</sup>.
- b. Case of a man with initial MS (35-year-old). He raped a 13-year-old girl who was his niece<sup>5</sup>.
- c. Case of obscenity by Syanwani alias Iwan/IW (45 years). The arrest of the man who worked as motor taxi driver was initiated by the report that the perpetrator has committed obscenity to eight children, namely BS (12), MMD (15), RR (15), RN (14), MIS (15), NSH (11), NK (13), FRH (13)<sup>6</sup>.
- d. Cases of rape and murder of a girl PNF (9-years-old). PNF was found naked and wrapped in a cardboard box in Kalideres, West Jakarta. From the autopsy, PNF was died because of sexual violence. The sexual intercourse was done by violence and resulted in death<sup>7</sup>.
- e. Case of rape and murder of Yuyun (14), a resident of Kasie Kasubun Village, Padang Ulak Tanding Sub-District, Rejang Lebong Regency, Bengkulu. She was raped and then killed by 14 perpetrators<sup>8</sup>.

<sup>4</sup>Reza Gunadha, Bocah Korban Sodomi Emon Kembali Bertambah Jadi 73 Orang, *Tribun Jabar*, (diakses dari <http://www.tribunnews.com/regional/2014/05/05/bocah-korban-sodomi-emon-kembali-bertambah-jadi-73-orang>, Tanggal 16 September 2017, Pukul: 11:56 WIB)

<sup>5</sup>Robertus Belarminus, Setubuhi Keponakan Berusia 13 Tahun Seorang Paman Masuk Bui, (diakses dari: <http://megapolitan.kompas.com/read/2015/08/13/1659Setubuhi.Keponakan.Berusia.13Tahun.Seorang.Paman.Masuk.Bui>, Pada tanggal 16 September 2017, Pukul: 13:37 WIB)

<sup>6</sup>Hendra Gunawan, Bocah Disodomi Sebelum Cabuli Korban Iwan Ritual Keris, *Tribun Jakarta*, (diakses dari: <http://www.tribunnews.com/metropolitan/2015/09/13/sebelum-cabuli-korban-iwan-lakukan-ritual-keris>, Pada Tanggal 16 September 2017, Pukul: 13:47 WIB)

<sup>7</sup>Eko Priiliawito, Bayu Nugraha, Muhammad Iqbal, Fakta Pembunuhan Dalam Kardus dan Jejak Agus Darmawan, *Viva.co.id* (diakses dari <http://metro.news.viva.co.id/news/read/685292-fakta-pembunuhan-dalam-kardus-dan-jejak-agus-darmawan>, Pada tanggal 16 September 2017, Pukul: 14:00 WIB)

<sup>8</sup>Yuliardi Hardjo Putro, Kronologi Kasus Kematian Yuyun ditangan 14 ABG Bengkulu, (diakses dari <http://regional.liputan6.com/read/2499720/kronologi-kasus-kematian-yuyun-ditangan-14-abg-bengkulu>, pada tanggal 16 September 2017, Pukul: 15:00 WIB)



From the various cases of sexual violence against children aforementioned above, they suggest the rampant cases of sexual violence against of children recently which lead to the public concerns. To optimize the protection of children, the government has issued Law No. 1/2016 on Protection of Children containing the gelding action for sexual abusers against children.

The determination of criminal punishment types is inseparable from the issue of objective setting to be achieved in the punishment. In other words, the formulation of the objective of punishment is directed to be able to differentiate as well as measure the extent to which the types of punishment, both in the form of "criminal" and "action" which have been established at the stage of legislation policy to achieve the objectives effectively. Although, the types of punishment for every criminal act is different, it is obvious that the imposition of punishments in criminal law should remain oriented towards the objective of sentences itself<sup>9</sup>. The castration punishment in the perspective of Islamic law and positive law of Indonesia becomes a pros and cons where there are different opinions arising in the community against the castration punishment.

## **B. DISCUSSION**

### **1. Islamic Law Perspective on the Castration Punishment for the Perpetrators of Sexual Violence Against Children**

Islamic law constitutes the rules which are derived from the teachings of Islam and commonly called "Sharia and Fiqh"<sup>10</sup>. Penalties in the Arabic term is often called '*uqubah* i.e. recompense form for a person for his actions violating the provisions of "syara" appointed by God and His Messenger for human benefits. The purpose of the punishment in Islamic law is the realization of the objective of Islamic law itself, namely the retaliation of evil, general and special prevention and

<sup>9</sup>M. Solehuddin, 2003, *Sistem Sanksi Dalam Hukum Pidana Ide dasar Double Track system dan Implementasinya*, Raja Grafindo Persada, Jakarta, p.7.

<sup>10</sup>Departemen Pendidikan Nasional, 2008, *Kamus Besar Bahasa Indonesia*, Edisi IV Cet. I, Gramedia Pustaka Utama, Jakarta, p. 363



protection of the rights of the victims. Therefore, the sentence is intended to bring the benefit for people and prevent injustices or disadvantages<sup>11</sup>.

"Islamic law" is a special term in Indonesia, as a translation of *al-fiqh al-Islamy* or in a particular context of the *al-Sharia al-Islamy*. In the western Abdul Qadir Ouda said that the most concrete example nowadays is the number of parties that do not accept Islamic law. They replace it with positive laws that created by human kinds. In fact, it is obliged to make Islamic law to regulate daily life<sup>12</sup>. Instead, it is forbidden to make non-Islamic law to regulate daily life. *Fuqaha* also agreed that any rule of positive law that is contrary to the principles of Sharia is considered as a vanity law and is not obliged to obey it.

Audah added whoever expressly rejects the existence of Islamic criminal law, such as hand cut punishment, *qadz* punishment, and adultery punishment with the excuse of violating human rights, then he is *kafir*. However, if it is not accepted with no reason that you are disobedient and deliberately reject the law of God, then he is unjust. Meanwhile, if one does not accept the God's law because of discrimination, then he is atheistic (*fasik*)<sup>13</sup>

That the legal norms must be fair is one of normative statements that is not always met because in practice, it is not uncommon that there is law objectively considered unfair. Fair or unfair is essentially a moral judgment, and it is not just a legal judgment. Thus, in this case, it becomes apparent that the norms of law and moral norms, though necessary to be distinguished, are not two completely separate things from one another. How can the relationship between them be explained? First, if we look at the rules of collective living as legal norms, it becomes evident that the rules are also reflected in moral norms. In this case, the moral norm becomes equal to the norm of law. For example: the moral norm, for not doing the sexual violence against children, in many

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<sup>11</sup> Makhrus Munajat, 2004, *Dekonstruksi Hukum Pidana Islam*, Logung, Yogyakarta, p. 39

<sup>12</sup> Abdul Qodir Audah, *AL-Tasyri Al-Jina'i Al-Islami*, Volume II, p. 707.

<sup>13</sup> Abdul Qodir Audah, *AL-Tasyri Al-Jina'i Al-Islami*, Volume II, p. 709.

societies has been used as a legal norm. Law is the public expression of a social morality that its implementation can be prosecuted and its offenders can be punished. Therefore, it is only limited to the dimension of public human life in society. Law cannot replace or represent morality. Correct or legitimate action is not necessarily true or morally good. In the contrary, although in general the actions which are not legally valid nor morally, when the existing law is an unjust law, morally good actions cannot be legally valid.

In Islamic Law, there is a book that is specifically to overcome criminal acts called as *fiqhjinayah* which has a systematic and more detailed discussion, actual and accommodative because it always adjusts to the country.

Al-Shabuni said that Kharijites group believes that stoning punishment does not represent Islamic sharia. They have three reasons that are thought very weak, weaker than cobwebs<sup>14</sup>.

- a. The stoning punishment is too sadistic. If it is prescribed by Islam, it must be mentioned in the Qur'an. However, everyone knows that there is not a single verse in the Qur'an that mentions stoning.
- b. Adultery committed by the servant is punished with half of the punishment of a free man. If what is divided into two is related to the number of hundred times whip, it is no problem. However, if it is related to the stoning that makes the perpetrators dead, it cannot be divided into two. There can be no half-death penalty. Therefore, this type of punishment is not lawfully enforced for servants.
- c. Because the punishment for the adulterer is general, the specialization of punishment for *muhson* adulterers violates the Qur'an.

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<sup>14</sup>Muhammad Ali Al-Shabuni, *Rawa'I' Al-Bayan fi tafsir Ayat Al-Ahkam min Al-Qur'an*, p.21



Those three arguments of the Kharijites are opposed by Ahlusunnah. Their arguments are as follows:

- a. Stoning which is not mentioned in Qur'an does not mean it is not regulated. Many provisions are not mentioned in the Qur'an, but they are clearly described in the hadith. Do not forget, Allah has us to always follow and implement all commands. Allah says: whatever the Messenger has given you - take; and what he has forbidden you - refrain from (Al-Hashr (59): 7). In addition, we also believe that all activities of the Prophet of Allah based on revelation, as what Allah says:

وَمَا يَنْطِقُ عَنِ الْهَوَىٰ . إِنْ هُوَ إِلَّا وَحْيٌ يُوحَىٰ

*Nor does he speak from [his own] inclination. It is not but a revelation revealed. (Al-Najm (53): 3-4).*

Therefore, how they can think that stoning is not regulated by Islam, if the Prophet had conducted it with his friends. As for the role and function of the Prophet of Allah is mentioned clearly in the Qur'an.

بِالْبَيِّنَاتِ وَالزُّبُرِ وَأَنْزَلْنَا إِلَيْكَ الذِّكْرَ لِتُبَيِّنَ لِلنَّاسِ مَا نُزِّلَ إِلَيْهِمْ وَلَعَلَّهُمْ يَتَفَكَّرُونَ

*[We sent them] with clear proofs and written ordinances. And We revealed to you the message that you may make clear to the people what was sent down to them and that they might give thought. (Al-Nahl (16): 44)*

- b. In contrast to the stoning which is not explicitly mentioned in the Qur'an, whip punishment for perpetrators of adultery *ghairumuhsoanjarimahis* explicitly confirmed in the Qur'an:

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيْشَهِدَ عَذَابُهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ

*The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment. (Al-Nur (24): 2)*

The aforementioned verse does not mention the number of lashes, but it also prohibits to be compassionate to the perpetrator. In addition, the execution process should be witnessed by the Muslims to create a deterrent effect and can be a valuable lesson.

The hadith which explains the sanction of exile as a complement of the whip punishment are:

عَنْ زَيْدِ بْنِ خَالِدٍ رَضِيَ اللَّهُ عَنْهُ عَنْ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنَّهُ أَمَرَ فِيمَنْ زَنَى وَلَمْ يُحْصَنْ بِحُلْدٍ مِائَةً وَتَعْرِيبٍ عَامٍ

*From Zaid bin Khalid Al-Juhani, he asked, "I heard the Prophet ordered that adultery ghairumuhson to be whipped a hundred times and exiled for one year." (Al-Bukhari)<sup>15</sup>.*

أَفْغَرِ دِينَ اللَّهُ يَتَّعُونَ وَلَهُ أَسْلَمَ مَنْ فِي السَّمَوَاتِ وَالْأَرْضِ طَوْعًا وَكَرْهًا وَإِلَيْهِ يُرْجَعُونَ

*So is it other than the religion of Allah they desire, while to Him have submitted [all] those within the heavens and earth, willingly or by compulsion, and to Him they will be returned. (Ali Imron: 83)*

وَمَنْ يَتَّبِعْ غَيْرَ الْإِسْلَامِ دِينًا فَلَنْ يُقْبَلَ مِنْهُ وَهُوَ فِي الْآخِرَةِ مِنَ الْخَاسِرِينَ

*And whoever desires other than Islam as religion - never will it be accepted from him, and he, in the Hereafter, will be among the losers. (Ali Imron: 85)*

Referred to the elements *jarimah* or crime, the main object of study of *fiqh jinayah* can be divided into 3 parts<sup>16</sup>:

<sup>15</sup> Al-Bukhari, Sahih Al-Bukhari, Volume IV, p.2733

<sup>16</sup> Nurul Irfan dan Masyrofah, 2016, *fiqh jinayah*, AMZAH, Jakarta, p. 2



- 1) *al-RUKN al-shar'i* or formal elements (elements stating that a person can be expressed as a perpetrator of *jarimah* or crime if there are laws that expressly prohibit and impose punishment to the criminal acts).
- 2) *al-RUKN al-madi* or material element i.e. the element stating that a person can be sentenced if he/she really did *jarimah* or crime, both positive (active in doing something) or negative (passive in doing something).
- 3) *al-RUKN al-adabi* or moral element i.e. the element stating that a person can be blamed if he is not a madman, underage children or under threat.

Those are the main objects of the study of *fiqh jinayah* if it is associated with elements of a criminal offense or *arkan al-jarima*. Meanwhile, if it is associated with discussion material, where it is closely related to the material elements or *RUKN al-madi*, the objects of the study of *fiqh jinayah* constitute three main issues *jarimah qisas*, *jarimah hudud*, *jarimah ta'zir*.

Castration is a form of punishment or action/treatment by injecting *antiandrogen* drugs, such as medroxyprogesterone acetate or cyproterone, i.e. drugs that can suppress the function of the testosterone hormone. It is to lower the level of testosterone, the male hormone, which is responsible for the emergence of libido<sup>17</sup>.

From the *definition* of operational variables and scope of the study described above, what is called castration punishment for the perpetrators of sexual violence against the children in terms of Islamic law is *al ikhsha* or castration which means cutting two testes (*al khushyatain*) or sometime combined with cutting the penis (*dzakar*). Therefore, castration can be a testicular cutting, and this is the basic terms of the castration. However, sometimes the castration can be in the action of cutting testis and penis at the same

<sup>17</sup>Supriyadi Widodo Eddyono, Menguji Euforia Kebiri, hal. 17, (diakses dari jurnal dalam [icjr.or.id/data/wp-content/uploads/2016/02/Menguji-Euforia-Kebiri.pdf](http://icjr.or.id/data/wp-content/uploads/2016/02/Menguji-Euforia-Kebiri.pdf), pada Tanggal 2 September 2017, Pukul 11:25 WIB)



time. Castration aims to eliminate lust and at the same time make barren. The castration methods generally have two main types: namely physical and hormonal (injection) methods. Physical method is done by cutting the organ that produces testosterone, i.e. testes. After the testes are cut and removed through surgery, the rest is tied up and then stitched. By cutting the testicles, it has men will lose sexual arouse and at the same time will become permanently barren.

Meanwhile, hormonal castration does not cut the testis or penis instead, it injects hormone to the castrated person. There are two methods of injection. Firstly, it injects the drugs that suppress the production of testosterone. Injection is done repeatedly so that testosterone seems lost. Secondly, the estrogen hormone is injected to the castrated perpetrator; as a result, he has the physical characteristics as female. The testosterone hormone will decrease and sexual desire will also decrease.

It needs to note that according to the majority of Islamic scholars, the castration sentence for perpetrators of sexual violence is prohibited (haram). It is of course that the scholars did not immediately issue an instruction (*fatwa*) without lengthy research and discussion stage, instead they have precisely discussed and examined it. Castration aims to eliminate lust and at the same time to make barren. Islam does not justify the castration of man according to the following hadiths:

Firstly, in the book of *Al-Ahkam Al-Fiqhiyyah Al-Muta'alliqah bi Al Syahwat*, Sheikh Adil Mathrudi said:

"The scholars have agreed that the castration to human beings is forbidden and is not allowed." ('Adil Mathrudi, *Al-Ahkam Al Fiqhiyyah Al Muta'alliqah bi Al-Shahwat*, p. 88).

Secondly, Islamic law has set a punishment for pedophiles who commit acts of sexual abuse and rape which is in accordant with

factual details of the actions. Therefore, it is forbidden (*haram*) to implement the provisions of punishment outside the Islamic Sharia. The unlawful prohibition of implementing non-sharia laws is as Allah says:

وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَىٰ اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ .  
وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ فَقَدْ ضَلَّ ضَلَالًا مُبِينًا .

*It is not for a believing man or a believing woman, when Allah and His Messenger have decided a matter, that they should [thereafter] have any choice about their affair. And whoever disobeys Allah and His Messenger has certainly strayed into clear error." (Al-Ahzab: 36)*

The verse clearly forbids Muslims to make a new provision if there is already a certain legal provision in Islamic Sharia. Therefore, it is unlawful to apply the law of castration for perpetrators of sexual violence, as Islamic Shariah is already establishing the details of specific punishment for perpetrators of sexual violence.

Third, the castration method used is the second injection method, i.e. the injection of the estrogen hormone. It is also forbidden from the other side, as it results in castrated males have female physical characteristics. Yet, Islam has forbidden men to resemble women or vice versa women resemble men. His prohibition is the hadith narrated by Ibnu Abbas RA:

لَعَنَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الْمُتَشَبِّهِينَ مِنَ الرِّجَالِ بِالنِّسَاءِ، وَالتَّشَبِّهَاتِ مِنَ  
النِّسَاءِ بِالرِّجَالِ

*"The Rasulullah Shallallahu 'alaihiwasallam cursed the men who resemble women and women who resemble men." (Narrated by Al-Bukhari no. 5885, 6834)*

This Hadith forbids men act like women or women act like a man. Therefore, the castration method with estrogen hormone injections to the men, the perpetrators of sexual violence is forbidden, because it becomes an intercession (*wasilah*) for men



to resemble the opposite gender (female). The rule of jurisprudence (*fiqh*) says:

الوسيلة إلى الحرام محرمة

"Al-Wasilahila al-haram muharromah."

Meaning: *All intercession toward the haram is also haram.*

Based on those three reasons, sentencing castration for the perpetrators of sexual violence is haram.

Islamic Sharia has already specified the details of certain punishment for the perpetrators of sexual violence who commit acts of sexual abuse and rape. The details of the punishment for the perpetrators of sexual violence are as follows:

- 1) If what the perpetrators of sexual violence do is committed fornication, the punishment will be the punishment for adultery (*had azzina*), i.e. stoning for a married person (*muhshan*) or whipped a hundred times if for unmarried person (*ghoiromuhshan*).
- 2) If what the perpetrators of sexual violence do is committed homosexual (*liwath*), then the punishment is death, nothing else.
- 3) If what the perpetrators of sexual violence do is committed is sexual harassment (*at taharusy al Jinsi*) and there is no fornication or homosexuality, the punishment is *ta'zir*.

## 2. The Implementation of castration punishment for the perpetrators of sexual violence against children in Indonesia

Before discussing the implementation of the castration punishment, the author firstly explains about the setting of the perpetrators of sexual violence in the positive law of Indonesia.

According to Sunaryati Hartono in his book entitled "*Politik Hukum Menuju Satu Sistem Hukum Nasional* (Political Law Towards One National Legal System)" states that law as a tool, practically legal law, is a tool or means and steps that can be used by



the government to create a national legal system to be used to achieve the ideals nation and state goals<sup>18</sup>.

National political law is the direction that must be taken in law issuance and law enforcement as well as the efforts to make the law as a process to achieve the aspirations and goals of the nation and state, legal ideals and rules of law in Indonesia as contained in the Preamble of the 1945 Constitution of the Republic of Indonesia, which put the Pancasila as the political paradigm of law and is a platform for the Indonesian people living together which are very diverse and remain tightly bound as a united nation<sup>19</sup>.

Sudarto views that the politics of law is, first: the attempt to realize better rules according to circumstances and situations at a specific time. Second: the policy of a country through the competent bodies to establish the desired rules that are supposed to be used to express what is contained in society and to achieve what is aspired to<sup>20</sup>.

Policies that have been recommended to be selected by policy makers are not guarantee that such policies would succeed in its implementation. There are many variables that influence the success of policy implementation either individually or in groups or institutions<sup>21</sup>. As the Pancasila country and upholds the values of nationality and humanity, Indonesia has many regulations that expressly provide child protection<sup>22</sup>, but the regulation has or hasn't provided safeguards, that is still an issue.

The legal regulations for the perpetrators of sexual violence against the children can be identified as follows:

a. Article 289 - Article 296 of the Criminal Code

<sup>18</sup>Satjipto Rahardjo, 1991, *Ilmu Hukum*, Cet III, Citra Aditya Bakti, Bandung, p. 352-353

<sup>19</sup>Mahfud MD, 2006, *Membangun Politik Hukum Menegakkan Konstitusi*, LP3ES, Jakarta, p. 30-31

<sup>20</sup>Sudarto, 1981, *Hukum dan Hukum Pidana*, Alumni, Bandung, p. 159

<sup>21</sup>AG. Subarsono, *Analisa Kebijakan Publik Konsep, Teori dan Aplikasi*, Pustaka Pelajar, Yogyakarta, 2015, p. 87

<sup>22</sup>Nasir Djamil, 2015, *Anak Bukan Untuk Dihukum*, Sinar Grafika, Jakarta, p. 27

- b. Article 81 and Article 82 of Law No. 23/2002 on Child Protection,
- c. Law No. 35/2014 on Amendment to Law No. 23/2002 on Child Protection
- d. Law No. 1/2016 on the Amendment of two articles of Law No. 23/2002 on Child Protection, namely article 81 is inserted Article 81A. Then Article 82 is inserted one Article 82A.

The regulation of castration punishment is stated in Article 1 (7), which says:

#### **Article 81**

- 1) In addition to the perpetrator as referred to in paragraph (3), the addition of 1/3 (one third) of the criminal penalty shall also apply to the perpetrator who has been convicted of a crime as referred to in Article 76D;
- 2) In the case of criminal offenses as referred to in Article 76D, the victims of more than 1 (one) person result in severe injury, mental illness, infectious disease, disruption or loss of reproductive function, and/or death, the perpetrators are sentenced to death, lifetime, or imprisonment of at least 10 (ten) years and maximum of 20 (twenty) years;
- 3) Toward the perpetrator as referred to in paragraph (4) and paragraph (5) may be subject to castration punishment and installation of an electronic detector;

Several Government efforts to address sexual violence against children, including legal reform in order to provide protection for children as victims of sexual violence namely the promulgation of Law No. 22/2002, Law No. 35/2014, and Law No. 1/2016 on Child Protection. Law No. 1/2016 stating the castration punishment for the perpetrators of sexual violence against children was issued because of the recurrence of cases of sexual violence against children which is very alarming, so many cases of sexual violence against children these days have become a public concern.



The existence of the castration punishment seen from the point of view of Pancasila whether it is contrary to the Second Amendment of the 1945 Constitution and Law No. 39/1999 on Human Rights stating that: "everyone has right to live" (Article 28A Jo Article 28 paragraph (1) of the 1945 Constitution and Article 9 Paragraph 1 Jo Article 4 of the Law of Human Rights); and "Everyone has the right to be free from forced disappearances and disappearances of lives" (Article 33, paragraph 2 of the Law of Human Rights). Regarding to the above matters, the followings may be expressed:

- a. Seen as a whole, Pancasila contains a balance value between one precept to the others. However, if Pancasila is seen partially (emphasizing on one of the precepts), there is an opinion which states that castration punishment is against the Pancasila and some state that it is not contrary to Pancasila. Therefore, the opinion that rejects and accepts the castration punishment are both based on Pancasila.

This can be seen in the study conducted by the Law Faculty of Diponegoro University in collaboration with the Attorney General's Office in 1981 stating that "there is a tendency among those who are pros and cons to make Pancasila as "justification"<sup>23</sup>.

- b. Criminal type cannot be simply confronted diametrically with human rights as well as the castration punishment because in essence all criminal types are against human rights. This is equivalent to "the right of personal freedom" (Article 4 of the Law of Human Rights) or the "right to freedom" (Preamble to the 1945 Constitution) which cannot be diametrically confronted to "imprisonment". When it is confronted diametrically, "the imprisonment" is also contradictory to the 1945 Constitution and the Law of Human Rights because the imprisonment is essentially "deprivation of liberty". Similarly, the death penalty that in Article 6 paragraph (2) of the ICCPR states that

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<sup>23</sup>Barda Nawawi Arief, 2015, *Pidana Mati Perspektif Global, Pembaharuan Hukum Pidana dan Alternatif Pidana Untuk Koruptor*, Pustaka Magister, Semarang, hal. 33

the death penalty is still possible for "the most serious crime"<sup>24</sup>. Therefore, the castration punishment can be sentenced to the perpetrators of sexual violence against children since it is now a serious crime and what is sentenced to the perpetrators of sexual violence against children is not arbitrarily granted to perpetrators. The castration punishment is not sentenced to all perpetrators of sexual violence against children but only to perpetrators who meet the elements of the Law No. 1/2016 on Child Protection.

There are pro-con responses about castration punishment. The castration punishment chosen as the means of criminal policy (crime prevention policy), particularly in overcoming the sexual violence against children through the implementation of castration punishment is a reasonable action. The reasons can be:

a. seen from the point of criminal law policy (penal policy):

Crime is included in criminal policy areas. This is bound with a broader policy, i.e. social policy which consists of social welfare policy and social defense policy<sup>25</sup>. A type of criminal sanctions (including castration punishment) used and chosen in the penal policy is basically a part of the criminal policy and social policy i.e. policies to achieve prosperity and effort or policy to do prevention and overcome the public protection.

The direction of legal policy aims to make the law as a rule that provides protection for the rights of citizens and ensure the life of the future generations<sup>26</sup>. Therefore, the legal system practice in each country continues to undergo modernization.

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<sup>24</sup>Ibid, p. 36

<sup>25</sup>Barda Nawawi Arief, 2014, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan*, Kencana Prenada media Group, Jakarta, p. 77

<sup>26</sup>Marlina, 2009, *Peradilan Pidana Anak di Indonesia*, Refika Aditama, Bandung, p. 1



- b. seen from the point of law reform efforts in Indonesia.

Law reform efforts in Indonesia that have been initiated since the issuance of the 1945 Constitution cannot be separated from the foundation as well as national goals to be achieved as formulated in the preamble of 1945 Constitution<sup>27</sup>. Those national goals are set out in the Fourth Paragraph of the preamble of 1945 Constitution.

The formulation of the preamble of 1945 Constitution shows two main national goals, namely:

1. to **protect** the whole people of Indonesian
2. to advance general **prosperity** based on Pancasila

Therefore, there are two key words of the national goals, namely "**Public Protection**"/social defense and the "**Society Welfare**"/social welfare. National goals become the basis and purpose of any legal reform effort, including the reform of criminal law, in this case the purpose of crime prevention of sexual violence against children.

Sentencing the castration to the perpetrators of sexual violence against children will not only provide protection to children who are the victims of sexual violence but it will also give protection to the wider community in order to live tranquilly, peaceful without any fear for children. Reason for human rights and human dignity has always been a consideration of castration punishment. However, it is necessary to note that human rights are not only human rights as human beings, but human rights are rights in which society should be protected from the perpetrators of sexual violence.

Sexual violence is seen as a crime that merely becomes a private matter (victim). However, it should be used as a public concern since it is clearly a form of behavior that accentuate lust, revenge and the superiority in which the most powerful one is entitled to sacrifice the

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<sup>27</sup>Barda Nawawi Arief, 2015, *Tujuan dan Pedoman Pemidanaan (Perspektif Pembaharuan dan Perbandingan Hukum Pidana)*, Pastaka Magister, Semarang, p. 34

others<sup>28</sup>. Correspondingly, NusryahbaniKantjasungkana argued that the problem of rape or sexual violence can no longer be viewed as a problem among individuals, but it is a social problem that is associated with human rights issues, especially regarding to the protection against all forms of torture, violence, cruelty and human dignity neglect<sup>29</sup>. Sexual violence and its treatment have become one of the indications and evidence of the lack of protection rights of sexual violence.

Violence often occurs against children, which can be damaging, dangerous and frightening children. Children who are victims of violence suffer a loss, either material or immaterial as emotional and psychological shock that can affect a child's future life<sup>30</sup>. The cases of sexual violence against children and even followed with murders are demanding seriousness to protect children. Castration punishment for the perpetrators of sexual violence against children is not arbitrarily granted to perpetrators. The punishment is not sentenced to all perpetrators of sexual violence against children but only for the perpetrators who meet the elements in the Law No. 1/2016 on Child Protection. In addition, it is sentenced with caution and through the process of detection of a medicine, in this case, the castration is only sentenced to the perpetrators with above normal erection ability. It is useful to suppress sexual urges and eliminate the erection ability. Therefore, legal policy is necessary to address sexual violence against children.

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<sup>28</sup>Abdul Wahid dan Muhammad Irfan, 2011, *Perlindungan Terhadap Korban Kekerasan Seksual Advokasi Atas Hak Asasi Perempuan*, Refika Aditama, Bandung, p. 62

<sup>29</sup>Eko Prasetyo dan Suparman Marzuki, 1997, *Perempuan Dalam Wacana Pemerkosaan*, PKBI- DIY, Yogyakarta, p. 178

<sup>30</sup>Maidin Gultom, 2014, *Perlindungan Hukum Terhadap Anak dan Perempuan*, Refika Aditama, Bandung, p. 1-2



## D. CONCLUSION

Based on the aforementioned discussion, it can be concluded that:

1. The castration punishment violates Islamic law; thus, it is forbidden for three reasons, namely:
  - a. Islamic Sharia has strongly forbidden the castration punishment, without any difference of opinion (*khilafiyah*) among jurists (*fuqaha*),
  - b. Islamic Sharia has set the punishment for pedophiles who commit acts of sexual abuse and rape which is in accordance with factual details of actions, so it may not (*haram*) implement the penalty other than the provisions of the Islamic Sharia.
  - c. In case of the castration method, the method used is chemical injection, i.e. estrogen hormone. It is forbidden as it results in castrated males will have female physical characteristics. However, Islam has forbidden men resemble women, or vice versa, women resemble men.
2. The implementation of castration punishment for the perpetrators of sexual violence against children in Indonesia has got pros and cons. However, castration punishment is chosen as a means of crime prevention policy, particularly in overcoming the sexual violence against children. This punishment is sentenced with caution, and through the process of detection of a medicine, in this case, the castration is only sentenced to the perpetrators with above normal erection ability.

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