

CRIMINAL RESPONSIBILITY FOR PEDOPHILIA UNDER GENERAL, TRADITIONAL AND ISLAMIC LAWS

Fitri Wahyuni

Fakultas Hukum Universitas Islam Indragiri Riau
Jl. Soebrantas, Tembilahan Hilir, Kec. Tembilahan, Kabupaten
Indragiri Hilir, Riau, 29281
E-mail: fw160586@gmail.com

M. Rizqi Azmi

Fakultas Hukum Universitas Islam Riau
Jl. Raya UIR, Indonesia, Simpang Tiga, Kec. Bukit Raya, Kota
Pekanbaru, Riau 28288
E-mail: m.rizqi.azmi@gmail.com

Riana Kesuma Ayu

Sekolah Tinggi Ilmu Hukum Sultan Adam Banjarmasin
Jl. Sultan Adam No.130, Surgi Mufti, Kec. Banjarmasin Utara,
Kota Banjarmasin, Kalimantan Selatan, 70122
E-mail: dr.ayu.mh@gmail.com

Herdiansyah

Fakultas Hukum Universitas Islam Indragiri Riau
Jl. Soebrantas, Tembilahan Hilir, Kec. Tembilahan, Kabupaten
Indragiri Hilir, Riau, 29281
E-mail: fw160586@gmail.com

Accepted: 10/12/2021; Revision: 20/12/2021; Approved: 28/03/2022

DOI: <https://doi.org/10.24815/kanun.v24i1.36346>

ABSTRACT

Pedophiles often engage in sexual interactions with underage children, whether it's "homosexual pedophilia," or "heterosexual pedophilia." This paper examines the criminal culpability of pedophiles in common law, Islamic law, and customary law. Normative legal writing research uses descriptive research methods. The writing uses the Legislative Approach for statutory interpretation, the Legal Concept Analysis Approach for analytical and conceptual analysis, and the Comparative Approach for legal system comparison. This work uses secondary library research data. This research uses descriptive and qualitative data analysis.

This study suggests that pedophiles are criminally liable under the legal principle of criminal liability. They are not mentally sick or disabled, which exempts them from criminal culpability under Article 44 of the Criminal Code. Social offenses like pedophilia are sensitive because they affect human dignity. In Al-Isra' 32, Allah SWT says, "And do not come near to adultery; indeed, it is a shameful act and an evil way." Islam condemns all sexual deviance and its connected activities. Al-Israa verse 32. The two varieties of pedophilia are heterosexual, which favors females, and gay, which prefers boys through anal or vaginal penetration (3). A society's culture includes customary law. Customary law is created by the community and can be identified. Law is a habitual standard established deliberately. Customary criminal law, based on social cohesiveness and communal norms, may violate legality. Customary criminal law must have prospective orientation, restorative justice, inherent criminality, and integration in law formation and enforcement.

Keywords: Criminal Liability, Pedophile Perpetrators **INTRODUCTION**

The current period of globalization has had a detrimental effect on the progress of information and communication technology. A new phenomena has emerged, specifically the occurrence of sexual violence against children. Child sexual violence is a grave offense that is progressively escalating and poses a substantial threat to the lives of children, causing harm to their personal growth and overall well-being. It also provokes a sense of discomfort, unrest, vulnerability, and societal insecurity. Child sexual abuse is a criminal act that frequently takes place, particularly among socioeconomically disadvantaged populations. Pedophilia is a type of sexual offense. Pedophilia is a criminal act characterized by sexual disorders that involve sexual cravings or thoughts about children. Typically, these offenses are perpetrated by individuals aged 16 years or older, targeting children aged 13 years or younger (pre-pubertal youngsters). (JPNN.com, 2021)

The term "pedophilia" originates from the Greek word "pedophilia," which is a combination of "paido" meaning kid and "philia" meaning love. Pedophilia, in its literal sense, refers to a sexual attraction or fondness towards youngsters. Nevertheless, as time progressed, the term underwent a shift in meaning and is now commonly employed to denote one of the psychosexual illnesses characterized by an atypical attraction towards young children. Individuals with pedophilia exhibit a proclivity for engaging in sexual activities with underage children. This can manifest as attraction towards young boys, known as "homosexual pedophilia," or towards young girls, referred to as "heterosexual pedophilia."

In a recent incident in 2021, a civil servant teacher working at a junior high school in Empat Lawang Regency, South Sumatra, was apprehended by the police on suspicion of engaging in pedophilic activities. In 2020, the Directorate of Cyber Crimes, Bareskrim Polri
Kanun: Jurnal Ilmu Hukum. Fakultas Hukum Universitas Syiah Kuala, Banda Aceh. 23111. ISSN: 0854-5499 | e-ISSN: 2527-8482. Open access: <http://www.jurnal.unsyiah.ac.id/kanun>

apprehended PS, an individual suspected of engaging in sexual offenses against male minors, in the province of East Java. He shared his interactions with the victim in the WhatsApp group of the pedophile community. The suspect recorded explicit acts with the victim. Subsequently, the video was shared on the community WhatsApp group. PS experiences a specific sense of fulfillment when he can contribute movies to the WA group. The manifestation of rape symptoms represents a significant societal obstacle that necessitates addressing. It is crucial to give serious consideration to the issue of rape among kids, as it can significantly affect the psychological and overall development of the child. (Alodia, Lie, & Anggreini, 2019)

Psychologically, the victim typically experiences intense anger, irritation, guilt, embarrassment, and humiliation. This psychological condition typically manifests as insomnia, decreased appetite, depression, stress, and anxiety. If the duration of this impact exceeds 30 days and is accompanied by acute symptoms such as recurring nightmares and rapid emergence of memories related to the event, it indicates that the individual is undergoing Post Traumatic Stress Disorder (PTSD), also referred to as post-traumatic stress in Indonesian. (Hayati, 2000)

In 2021, a case of pedophilia took place in Lubuk Linggau. The perpetrator, a civil servant teacher employed at a junior high school in Empat Lawang Regency, South Sumatra, was apprehended by the police. He was accused of engaging in pedophilic activities. In 2020, the Directorate of Cyber Crimes, Polri Crime Investigation Headquarters apprehended PS, an individual suspected of engaging in sexual offenses against male minors, in the province of East Java. As Raden Prabowo Argo Yuwono, the Head of the Public Information Bureau of the National Police, the individual accused of committing sexual violence against minors shared footage of his actions with the victim on a WhatsApp group associated with the pedophile society. "The suspect documented their explicit actions with the victim." Subsequently, the videos were uploaded to the WhatsApp group. He derives a specific sense of fulfillment when he can upload videos to the WhatsApp group. Sexual abuse is a significant social issue that demands considerable attention due to its profound influence on the psychological and overall development of children.

Psychologically, the victim typically experiences intense anger, irritability, guilt, embarrassment, and humiliation. This psychological disease typically induces insomnia, decreased appetite, depression, tension, and anxiety. If the duration of this impact exceeds 30 days and is accompanied by acute symptoms such as recurring nightmares and rapid

emergence of memories related to the event, it indicates that the individual is undergoing Post Traumatic Stress Disorder (PTSD), also referred to as post-traumatic stress in Indonesian.

Multiple studies have been completed on sexual abuse, including a 2017 investigation by Anak Agung Ayu Sinta Paramita Sari titled "Criminal Liability and Criminalization Against Pedophiles in Indonesian Criminal Law."⁸ The investigation determined that according to the Indonesian Criminal Law, Pedophilia is classified as an obscene or criminal act committed against children. The rule in Article 44 of the Criminal Code lacks clarification regarding court rulings about this topic. Consequently, the Indonesian Criminal Law treats pedophilia as a criminal act rather than a mental disease, warranting punishment. (Sari, 2017)

There is a lack of comprehensive research on the criminal culpability of pedophiles under the common law system, traditional law, and Islamic law. This research aims to identify the criminal responsibility for pedophiles according to the common law system, Islamic law, and traditional law.

RESEARCH METHOD

This research employs a normative approach to law writing, utilizing descriptive research methods. Diverse methodologies were employed in this study. The three approaches are the statutory approach, analytical and conceptual approach, and comparative approach. The data included in this work consists of secondary data obtained through library research. The data analysis in this study is characterized by a descriptive qualitative approach.

RESEARCH OUTCOME AND DISCUSSION

1. Criminal Liability of Pedophiles According to the Common Law System.

According to the theory of criminal law, pedophiles can be held legally responsible for their actions because pedophilia is not considered a mental disorder or developmental issue that would exempt them from criminal liability, as stated in Article 44 of KUHP. Pedophilia is recognized as a mental disorder characterized by a sexual attraction towards children. Thus, a pedophile is seen as capable of assuming legal responsibility as a legal

entity. From the perspective of accountability, only individuals who possess the capacity to be responsible may be held accountable. The prerequisite of being capable of responsibility must be met. E.Y. Kanter and S.R. Sianturi outlined the criteria for determining a person's capacity for responsibility (toerekeningsvatbaarheid). According to them, an individual is considered capable of being responsible if they do not suffer from persistent or temporary illnesses, are not mentally disabled (such as being stupid, idiotic, or imbecilic), and are not affected by factors like shock, hypnotism, anger, subconscious reflexes, delirium caused by fever, cravings, and similar conditions. Put simply, he is conscious. He possesses the ability to comprehend his actions, ascertain his intention to carry out the action, decide whether or not to proceed with it, and identify any flaws in the activity.

According to Article 3 of Law Number 35 of 2014, which amends Law Number 23 of 2002 on child protection:

The objective of child protection is to guarantee the achievement of children's rights, enabling them to live, thrive, progress, and engage fully in line with human dignity. This is done to achieve the well-being and success of Indonesian children, characterized by excellence and prosperity.

The Children Protection Law Number 23 of 2002, specifically Chapter III Articles 4-19, outlines the rights and obligations of children. These include the right to live, grow, and develop, as well as the right to practice their religion and have knowledge of their parents and identity. Children are entitled to receive health care, education, social welfare, and protection from various forms of harm, including exploitation in political activities, participation in military conflicts, involvement in social unrest, engagement in occurrences that involve violence, and participation in armed conflict. Children are afforded protection against different forms of abuse, are granted freedom, and receive legal aid and other forms of assistance if they become victims or perpetrators of crimes. Additionally, Article 19 establishes certain obligations for children, including respecting their parents, showing love for their family and country, practicing their religion, and adhering to high ethical and moral standards.. (Sari, 2017)

The criminal act of pedophilia according to KUHP is regulated in Article 285: "Whoever by force or threat of violence forces a woman to have sex with him outside of marriage, is threatened with raping with a maximum imprisonment of 12 (twelve) years".

Article 285 of KUHP states that violence or threats of violence by force threaten a woman to have sex with him outside of marriage, with violence or threats of violence. According to SR. Sianturi violence is every action that uses force on a human or thing which can cause loss to the victims of violence (SATU, 2012)

P. AF. Laminintang views the legal definition of violence remains ambiguous, and even in the field of jurisprudence, there is no definitive court ruling that provides a clear interpretation of the term. Adami Chazawi contended that the methods of coercion, as outlined in Article 285 of the KUHP, are restricted to two means: physical force and intimidation with the prospect of violence. These two actions lack more elucidation in KUHP. The occurrences in this context involve acts of aggression, threats, and coercion towards a woman who is a victim of violence, sexual intercourse including violence, and subsequent bodily and psychological suffering inflicted upon the victim.

Article 289 of the KUHP concerning sexual harassment states that:

"Whoever by force or threat of violence forces a person to commit or allow an obscene act to be carried out, is threatened with a maximum imprisonment of 9 (nine) years for committing an act that attacks the honor of morality, "

The formulation meant by obscenity for the explanation of Article 289 that obscenity is an act that violates the honor of morality and a heinous act, kissing, groping, in this article not only forces people to commit obscene acts, but also forces people to let committing obscene.

Articles 293, 294, 295, and 296 of KUHP mention obscene acts as:

- a. obscene act due to deceit or excessive influence or receiving a gift, an agreement to give money or goods to a child who is not yet an adult or has no defects in behavior, is punishable by a maximum imprisonment of 5 (five) years”;
- b. Whoever commits an obscene act with his child, step, or adopted child, under his supervision who is not yet an adult, or with a person whose education or care is handed over to him is punishable by a maximum imprisonment of 7 (seven) years”
- c. The maximum imprisonment of 5 (five) years if intentionally causes or facilitates obscene acts by his child, adopted child, or child under the supervision , or by an immature person whose education or care is handed over to him, or by a minor with another person;

- d. Whoever intentionally causes or facilitates obscenity by another person with another person, and makes it as job or habit, is threatened with a maximum imprisonment of 1 (one) year 4 (four) months or a maximum fine of fifteen thousand rupiahs. imprisonment for a maximum of 7 (seven) years; (Soesilo, 1996)

Law Number 35 of 2014 concerning amendments to Law 23 of 2002 Article 80, Articles 81 and 82, concerning child protection in criminal provisions, that:

- a. Any person who commits atrocities, violence or threats of violence, or abuses children, shall be punished with imprisonment for a maximum of 3 (three) years and 6 (six) months or a maximum fine of Rp. 72,000,000.00 (seventy two million rupiahs);
- b. In the event that a child who commits atrocities, violence, or threats of violence, and abuses children, seriously injured, the perpetrator is sentenced to maximum imprisonment of 5 (five) years or maximum fine of Rp. 100,000,000.00 (one hundred million rupiah);
- c. If it results in the death of a child, the perpetrator shall be sentenced to maximum imprisonment of 10 (ten) years or maximum fine of Rp. 200,000,000.00 (two hundred million rupiah);
- d. If it is the adult who commits the abuse against the child, then one third of the provision is added;
- e. any person who intentionally commits violence or threats of violence to force a child to have intercourse with him or with another person and obscene, shall be punished with imprisonment for a maximum of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp. 300. 000. 0000.00 (three hundred million rupiah) and at least Rp. 60,000,000.00 (sixty million rupiah);
- f. The criminal provisions as mentioned also apply to people who intentionally commit deception, a series of lies, or persuade a child to have intercourse with him or with other people.

Law Number 23 of 2002 concerning child protection Article 7 states that: "Anyone who intentionally acts:

- a. discrimination against children which causes the child to suffer losses, both materially and morally so that it hinders his social function or;

- b. Neglect of a child that causes the child to experience pain or suffering, either physically, mentally, or socially;
- c. Sentenced to a maximum imprisonment of 5 (five) years or a maximum fine of Rp. 100. 000. 000, 00 (one hundred million rupiah)".¹⁷

Law Number 39 of 1999 concerning Human Rights Article 2 states that:

"The Republic of Indonesia recognizes and upholds human rights and basic human freedoms as rights that are inherently inseparable from humans, which must be protected, respected, and maintained for the sake of increasing human dignity, welfare, happiness, intelligence and justice."¹⁸

All children possess the same fundamental rights as adults. There is a lack of active engagement and commitment from numerous stakeholders in Indonesia to actively safeguard the well-being of children. Children, being very susceptible to various threats within society, are often subjected to discriminatory acts. The legal protection of children in Indonesia includes safeguarding their numerous rights and interests, particularly those about their well-being. Sexual harassment encompasses both indecency and moral transgressions, constituting infractions not just of national legislation but also of global concern.

Pedophilia is a criminal offense that violates Law Number 39 of 1999, which is specifically focused on protecting human rights. This crime goes against the principles and values of human rights. According to Article 9 of Law Number 39 of 1999 on human rights, every individual has the fundamental right to life. Additionally, Article 11, Article 12, Article 13, Article 14, Article 15, and Article 16 establish that everyone has the right to personal development, communication, access to information, advocacy for self-development, and engagement in social work and policies. The aforementioned Article pertains to the offense of pedophilia, whereby the victim, being a child, suffers detrimental consequences. This crime hinders the child's proper development, leading to feelings of insecurity, as well as physical and psychological disorders.

Articles 17, 18, and 19 affirm the universal right to access justice without any form of discrimination. Similarly, Articles 28, 29, 30, 33, and 35 guarantee the right to security, political and national protection, self-defense, family, honor, dignity, and freedom from torture and inhumane treatment. This article is anticipated to offer security for individuals

to thrive and progress within society and the nation. Article 52 to Article 66 provides
Kanun: Jurnal Ilmu Hukum. Fakultas Hukum Universitas Syiah Kuala, Banda Aceh. 23111. ISSN: 0854-5499 | e-ISSN: 2527-8482. Open access: <http://www.jurnal.unsyiah.ac.id/kanun>

comprehensive protection for both human rights and fundamental human responsibilities, ensuring a sense of safety and tranquility. These articles examine the topic of children's rights from multiple perspectives, including the protection provided by parents, families, communities, and the nation. They also address the legal protection of children's rights from the moment they are in the womb. Every child is entitled to legal protection, education, healthcare, and safeguarding from various forms of exploitation such as sexual harassment, kidnapping, child trafficking, and other forms of abuse. Additionally, they address the prevention of harm to children's development caused by substances like narcotics, psychotropic substances, and addictive substances, as well as various forms of violations against children. The government must uphold human rights, as outlined in Article 71 and Article 72. Special attention must be given to ensuring the full protection of children's rights so that they can grow and develop under the principles of human rights and the provisions of relevant legislation.

According to Law Number 4 of 1979 on Child Welfare, specifically Articles 2, 3, 4, 5, 6, and 8, children are entitled to receive child welfare, care, and supervision to facilitate their optimal development. The article also elucidates the perilous circumstances that pose a threat to children, and the importance of obtaining support within the family and community settings. Additionally, it emphasizes the significance of accessing aid and resources that are specifically designed to promote the well-being of children. The article discusses the well-being of children in different situations. It highlights the contradiction between the crime of pedophilia and the welfare of the child, which poses various risks and threats to their growth and development. The responsibility for the welfare of the child is emphasized in Article 9 and Article 10, placing parents as the primary agents in ensuring the child's physical, social, and spiritual well-being. Articles 11, 12, and 13 outline the efforts made to promote child welfare, including fostering, development, prevention, and rehabilitation. A child's development encompasses not just physical growth, but also cerebral, social, and emotional aspects.

Ki Hajar Dewantara asserted that children, being divine creations, human beings, and living organisms, develop and thrive under their inherent essence, which serves as their source of resilience and vitality. The statement asserts that children are budding individuals with the potential to become the future generation and play a crucial role in ensuring the nation's continuity. Consequently, it is imperative to provide children with ample opportunities to grow and develop optimally in terms of their physical, mental, and

social well-being. Legal protection for children is crucial to ensure their growth and development, as well as to combat acts of discrimination, exploitation, sexual violence, and other crimes that victimize children.

2. Criminal Liability of Pedophiles According to Islamic Law

In Arabic, punishment is commonly referred to as 'uqubah, which serves as a means of retribution for individuals who transgress the regulations of syara' established by Allah and His Messenger for the betterment of humanity. The purpose of punishment in Islamic law is to achieve the fundamental objectives of Islamic law, which include retribution for wrongdoing and the prevention and safeguarding of the rights of the victim. The purpose of punishment is to ensure the welfare of the public and deter any acts of injustice or injury.

Typically, each illegal act perpetrated by an offender results in legal penalties (*'uqubah*), with the specific type of penalties being determined by the gravity of the crime. Legal experts classify illegal conduct into three categories from a legal standpoint: *jarimah hudud*, *jarimah qishash* or *diyat*, and *jarimah ta'zir*. Nevertheless, some individuals categorize punishment into four distinct forms:

- a. Al-Hudud, certain and absolute legal sanctions that are the right of Allah, which cannot be changed by anyone. Sanctions must be implemented, when
- b. the conditions of the crime are fulfilled. This sanction is imposed on serious crimes such as adultery, *sariqah*, *qadzaf* and others.
- c. Al-Qishash and al-Diyat. *Al-qisash* is a retaliatory punishment, such as killing the killer. *Al-diyat* is a sanction in the form of compensation, such as if the victim's family of the murdered forgives the killer, then the alternative punishment is *diyat*. *Al-qisash* and *al-diyat* are a combination of God's rights and human rights.
- d. Al-Ta'zir is a legal sanction that is the decision of a judge or competent authority to carry out the sentence, such as imprisonment, exile and others.
- e. Kafarat and Fidyah are legal sanctions in the form of paying fines, which the implementation is extended to the violator. The form of this fine can be in the form of freeing slaves, fasting, slaughtering animals or feeding the poor.

In terms of the relationship between one punishment and another, punishment can be divided into four:

- a. The main punishment (*al-uqubat al-ashliyah*) is the original punishment for a crime, such as the death penalty for murderers and *jilid* a hundred times for adulterers.
- b. Substitute punishment (*al-'uqubat al-badaliyah*) is a punishment that occupies the place of the main punishment if the main punishment cannot be carried out for a legal reason, such as a *diyat* penalty/fine for an intentional murderer whose *qisash* is forgiven by the victim's family or a *ta'zir* punishment if the basic law in the form of hadd cannot be implemented for some reason.
- c. Additional punishment (*al-'uqubat al-taba'iyah*) is a punishment imposed on the criminals based on following the main punishment, such as preventing a murderer from inheriting the property of the murderer.
- d. Complementary punishment (*al-'uqubat al-takmiliyah*) is a punishment that is imposed as a complement to the punishment that has been imposed, such as hanging the hand of a thief who has been cut to his neck. This sentence must be based on a separate judge's decision. At the same time, the substitute sentence does not require a separate judge's decision.

Implementing castration as a punitive measure for pedophiles is regarded as a potential way to mitigate the enduring consequences associated with their actions, what is the Islamic perspective on the punishment for pedophilia or child predators? Cholil Nafis, the Commission for Da'wah and Community Development, castration as a treatment for pedophiles serves to shock the offenders and instill dread in both potential offenders and deterrents.

In Islam, only murder and adultery are directly punishable crimes, but other offenses may have indirect consequences. Consequently, the judge or the government is responsible for using their judgment to determine the suitable punishment for additional crimes.

Regarding the crime of rape, only the individual who committed the act of compulsion (the rapist) is subject to the hadd penalty. However, certain viewpoints argue that the punishment for coercion falls under the category of sadistic behavior and is encompassed within the hirabah instance. The Arabic term for rape is "al wath`u bi al ikraah," which refers to sexual intercourse that is forced onto someone against their will. When a male commits the act of rape against a woman, it is universally acknowledged

by experts that the woman is not subjected to punishment for the offense of zina (had az zina), which often involves either receiving 100 lashes or being stoned.

The substantiation for this claim lies in the Qur'an and the Sunnah. The evidence of the Qur'an consists of the divine words of Allah SWT, which state that if someone is compelled by need and acts without desire or exceeding the limits, then their Lord is forgiving and merciful. The verse you are referring to is from Surah Al An'aam, verse 145. Ibn Qayyim recounts that Ali bin Abi Talib invoked this passage as evidence to persuade Caliph Umar bin al-Khattab to release a woman who had been coerced into committing adultery by a shepherd. The woman had been driven to such desperate measures due to her extreme thirst. In regards to the proof of the sunnah, the Prophet SAW stated that it has been absolved from the sins or sanctions of his ummah due to unintentional actions, forgetfulness, and circumstances beyond their control. Thirty

According to the canonical sources of Islamic law, the prevailing opinion among academics is to prohibit castration for humans. These include Imam Ibn Abdil Bar in Al Istidzkar (8/433), Imam Ibn Hajar Al Asqalani in Fathul Bari (9/11), Imam Badruddin Al 'Aini in 'Umdatul Qari (20/72), Imam Al Qurtubi in Al Jami' li Ahkam Qur'an (5/334), Imam Shan'ani in Subulus Salam (3/110), and various other experts of Islamic jurisprudence. Ibn Hajar al-Asqalani and Syekh Adil Matrudi state in Al Ahkam Al Fiqhiyyah Al Muta'alliqah bi Al Syahwat that scholars have unanimously agreed that castration is prohibited for humans.

The scholars who prohibited castration have engaged in a debate on the hadith of Ibn Mas'ud RA, which states, "We used to engage in battles alongside the Prophet SAW while being separated from our wives." Subsequently, we inquired the Prophet SAW, "Is it permissible for us to engage in castration?" The Prophet explicitly prohibited it. The narration is found in the works of Bukhari, Muslim, Ahmad, and Ibn Hibban.

Furthermore, scholars who seek to exercise ijtihad in formulating Islamic law must consult the genuine existent rules, in addition to the authoritative hadith that explicitly forbids castration. Rape cases can be derived from existing laws, namely those pertaining to adultery or homosexuality. If pedophilia is categorized as adultery, the prescribed penalty is either 100 lashes or death by stoning. If an individual who engages in pedophilia is categorized as liwath (gay), they are subject to a capital punishment. If the

act of sexual harassment (taharusy al jinsi) does not involve committing adultery or homosexuality, the appropriate punishment is takzir.

In Islamic criminal law, the notion of adultery diverges from that of other legal systems. In Western legal systems, zina is defined as sexual intercourse between a man and a woman who are married, either to each other or to someone else. This definition is excessively limited, as it fails to classify as adultery the act of two unmarried individuals of opposite sexes engaging in sexual intercourse.

According to Islamic law, adultery is an act of sexual intercourse that is forbidden in the genitals or anus by two (or more) people who are not husband and wife, adultery in this view is not limited to married people, but applies to anyone who having sex while they are not husband and wife, whether married or not. Anyone who is proven committed adultery, then he is exposed to *zina*. However, there are differences in the penalties that will be imposed on people who have or have been married to people who are not.³²

There are three forms of punishment for adultery, lashes, exile, and stoning. The first two punishments are imposed on the adulterer of Ghair Muhsan, the unmarried adulterer, while for the adulterer Muhsan, who is either still married or has broken up with his marriage, stoning applies. Some scholars say that the punishment for this muhsan is just lashing as stated in the Qur'an that there is no separation of adultery.³³

As stated in the letter Al-Isra verse 32: which means "And do not come near to adultery; surely it has been an obscenity and odious as a way." (Surah Al-Isra: 32) And Surah An-Nur verse 2: which means "The female fornicator and the male fornicator, then lash each one of them a hundred lashes, and let not compassion for them (both) take (hold of) you in the religion of Allah, in case you believe in Allah and the Last Day; and let a section of the believers witness their (The torment of the two of them) torment." (Surah Nur: 2)

In a hadith it is explained, "Take the law from me, because God has provided a solution for them (a woman who commits adultery) girl and boy a hundred lashes and exile for a year, while widows are a hundred lashes and stones are thrown (stoning)."

Similarly, regarding the punishment of exile, Abu Hanifa and his students did not recognize the existence of this exile punishment, on the contrary, Imam As-Shafi'i acknowledged its existence as an additional punishment, according to the hadith above they did not recognize this type of punishment saying that exile is not a *had* punishment

(prescribed punishment) but as a ta'zir punishment, if it is necessary and this is the right of the ruler.³⁴

Abd Qadir Audah defines ta'azir as teaching for mistakes that are not determined by the *syarak*. As an immoral act that is punishable by one or several *ta'azir* punishments, he further said that the criminal who is sentenced by ta'azir are any criminal other than *hudud*, *qishash* and *diyat* crimes because these three crimes have been determined the form and the amount of punishment by *syarak*.

liwath (homosexual) is an act that is forbidden by Allah and His Messenger. The perpetrator of liwath will get the curse of Allah and a painful torment. This is based on the warnings given by Allah by referring to His word which narrates about the people of the prophet Lut. Liwath is a sin that the Prophet (SAW) feared could happen to the Muslims, he said: "What I fear the most about you is the actions of the people of Lut".

He cursed three times to anyone who did the same thing as the people of Lut. *Had liwath* is sentenced to death without distinguishing between perpetrators who are married and those who are not, Rasulullah SAW said: "Whoever you find doing the deeds of the people of Lut, *liwath*, kill the perpetrator and the object". Islamic law curses and prohibits *liwath* and threatens the perpetrator with the death penalty. This has been determined based on the Qur'an, Sunnah and *Ijmak*. Proving of *liwath* does not have to use four witnesses, but it is the same as proving one of the *had* of *hudud* besides adultery. Liwath is proven by the confession of the perpetrator, or the testimony of two fair witnesses, or the testimony of a man and two women.

Islamic criminal law has provisions called *jarimah* if it meets the following three elements:

- a. There is a formal aspect (*al-rukun al-syar'i*), there is a prohibition accompanied by the threat of punishment according to Nash.
- b. The material element (*al-rukun al-madi*), an act that forms the *jarimah*, which includes that category is a violation of leaving obligation.
- c. The moral element (*al-rukun al-abadi*), the object for which punishment is introduced, or called the perpetrator of the crime. Can accept the *khitab* or can understand *taklif*, meaning that the perpetrators of crimes are *mukallaf* so that they are prosecuted for the prosecuted crimes.

Based on the elements above, pedophilia is included in the *jarimah*. Pedophiles are adults (*mukallaf*) who commit acts that violate the provisions by making children to comply with their crimes, committing sexual acts outside of marriage, pedophiles also commit inhumane violence and even threaten children's lives. Islam views sexual activity not only as a satisfaction to fulfill sexual desire but also as related to ethics and religious values. allowed sexual activity in Islam through legal marriage and by following the provisions. If all sexual crimes are committed outside the basis of the halal path, they can be considered illegal and deviant sexual activities. In the case of a criminal act of pedophilia, Islam considers the act prohibited by *syara'* because it violates the rules that have been determined in the *nash*. Pedophilia is an act that is contrary to human character and nature because of the negative impacts on both the perpetrator and the victim.

Islam has determined the punishment for actions that threaten society whether it is by destroying the social system or social safety can be categorized as an act of *jarimah* or one of the actions prohibited by *syara'*, in other words, the act is threatened by Allah with *had* or *ta'zir* punishment.

The main purpose of the implementation of *had* or *ta'zir* punishment is.

- a. Prevention is aimed at people who have not done *Jarimah*
- b. Making the perpetrators afraid. it is aimed at preventing the perpetrators from repeating their actions in the future
- c. Kurati (*Islah*). *Ta'zir* must be able to bring improvements to the behavior of the perpetrators in the future
- d. Education is aimed at changing the perpetrator's lifestyle better

The scope in the context of prevention here is to prevent the perpetrator from committing a crime and to prevent others from committing the immoral act. Sentencing also aims to form a better society with mutual respect and love among the members by sticking to the boundaries of law or provisions.

The crime of pedophilia is categorized as a crime of morality which is considered very sensitive because it involves the issue of human honor. Islam strictly prohibits all forms of acts of sexual deviation and all things that approach it, under the word of Allah SWT in Surah Al-Isra 'verse: 32 which means: "And do not approach adultery; Indeed, adultery is a heinous act. and a bad way." (Surat al-Israa' verse 32)

As explained earlier, the type of pedophilia is divided into two types, heterosexual pedophilia (more attracted to girls) and homosexual pedophilia (more attracted to boys).

a. Sanctions for Heterosexual pedophiles

In Islam, rape is an act that occurs in the presence of a sexual relationship between a man and a woman in a forced state and occurs outside a legal marriage so that it can be categorized as adultery. Abdul Qadir Audah argued rape is an act that is punishable by *hadd* because the act has an element of coercion.

b. Sanctions for homosexual pedophiles

Homosexual acts do not only occur in modern times, but these actions have been carried out in the past, namely the time of the Prophet Lut. Islamic law views that homosexual acts are *haram*, and the scholars have agreed on their prohibition. They only differed in opinion regarding the appropriate punishment to be imposed on the perpetrators.

3. Criminal Liability of Pedophiles According to Traditional Law

Traditional criminal law, also known as *Adatrecht Delicten*, comprises a set of established legal principles that govern actions or offenses that result in societal disruption and require resolution through punishment to maintain social stability. Lesquillier, in his book "Het Adat Delictenrecht," states that... In the Magical World According to *Beeschouwing*, wrongdoing in traditional law refers to an action or occurrence that goes against the principles of justice and propriety upheld by society, leading to disturbance of the peace and stability of the affected community. To achieve peace and stability, traditional responses are implemented. These responses aim to rectify and counteract unfortunate circumstances resulting from a traditional occurrence.

According to customary criminal law, when an individual commits a violation, it disrupts the stability of the community. As a result, not only should the violator be held accountable for their actions, but their relatives should also face legal penalties. This diverges significantly from the principles of Western criminal law, which provide that the individual who commits a crime bears sole responsibility for their actions.

Traditional criminal law primarily emphasizes the presence of outcomes, whereby those who have inflicted harm upon others or the community are held accountable for the resulting consequences, along with their families. The concept of Western criminal law is distinct, as it only holds individuals accountable for their actions if they violate the law and cause harm.

Nyoman Serikat Putra Jaya views traditional criminal law is a dynamic legal system that will persist as long as the cultural practices of a society endure, and it cannot be eliminated through legislative means. Implementing legislation to abolish it would render it ineffectual. Conversely, criminal law legislation will be deprived of its foundation of resources, as traditional criminal law is intricately linked to the anthropology and sociology of the legislation itself.

Traditional legal systems do not distinguish between violations of criminal law and civil law. This is because these systems only acknowledge a single method for prosecuting both civil and criminal offenses. It signifies that there exists a solitary legal officer who possesses the authority to undertake specific actions (conventional responses) in order to assess the breach of the law, namely the leader, village judge, or district court judge, for all categories of traditional law offenses. Traditional criminal law has the following characteristics:

- a. Whole and unify

Because it is a cosmic value which is interconnected with one another. traditional criminal law does not distinguish between criminal and civil violations.

- b. Open terms

This is based on the inability to predict what will happen so that it is not certain therefore the provisions are always open to all events or actions that may occur.

- c. Differentiating the problem

In the case of a violation, what is reviewed is not only the act and its consequences, but also the background and who is the violator. With this reason, the solution in an case becomes different.

- d. Court by request

Resolving traditional violations is mostly based on requests or complaints, demands or claims from parties who have been harmed or treated unfairly.

- e. Action or correction

Reaction is imposed not only on the violator but also on his relatives or family, it even can be imposed on the community concerned to restore the stability.

Customary law does not acknowledge a fixed regulatory framework. Hence, traditional offenses are not immutable, implying that a traditional law has a limited duration. Each conventional law regulation undergoes a cycle of emergence, development, and eventual disappearance as a new customary law regulation takes its place. Similarly, the new regulation will also evolve and eventually vanish as the

prevailing sense of justice among the individuals who initially established the regulations changes. And this process always persists. This implies that the violation of the law loses its validity over time as the law being broken adapts to the evolving sense of justice among the people. The sense of justice progresses continuously in tandem with the development of individuals' lives, which are perpetually shaped by both physical and spiritual influences.

Traditional criminal law is still maintained in KUHP which will replace the KUHP originating from Wvs. Article 1 of the draft of KUHP stipulates:

- a. No one can be convicted or subject to action unless the act committed has been determined as a criminal act in law regulations in the time the act was committed;
- b. In determining the criminal act, it is forbidden to use analogies
- c. The provisions as referred to in article (1) do not reduce the law or traditional law which stipulates a person deserves to be punished according to local custom even though the act is not regulated in statutory regulations;
- d. The application of the law that is present in society as referred to in article (3) is permitted as long as it is under the values of Pancasila and/or general legal principles recognized by the people.

Von Savigny's explanation accounts for the presence of customary law as a form of regional legislation. He asserts that traditional law is an integral component of a society's culture. Yanis Maladi stated that the creation of law does not stem from a random decision made by a lawmaker, but rather traditional law is developed and can be traced within the collective consciousness of the people. Law is a standard that arises from customary behavior and is then established through legal processes (juristic activity). An instance of customary law within Indonesian society is the Balinese traditional law. The Balinese people rigorously abide by the regulations of traditional law as delineated in awig-awig. An interesting oddity exists where the Balinese exhibit greater compliance with Balinese traditional law compared to Indonesian positive law. The enforcement of the traditional law system is influenced by the social control exerted by the community, where the presence of social punishments is more intimidating than criminal sanctions. One of the measures implemented in the Tenganan Traditional Village, Karangasem-Bali, to address criminal acts is the application of traditional punishments, which are based on customary criminal law.

Muladi, as cited by Nyoman United Putra Jaya, said that conventional criminal law, which is rooted in the principles of harmony and communal morality, is incompatible with the notion of legality. The formulation and implementation of traditional criminal law must adhere to four fundamental principles: prospective orientation, restorative justice, recognition of natural crimes, and integration which can be described as follows:

- a. The aim of punishment is not giving retaliation;
- b. The crime must cause a clear loss or victim, which has already occurred in a material offense or has the potential to be in a formal offense;
- c. Traditional criminal law is not used if there are other better and more effective methods;
- d. Losses due to the sentencing process must be smaller than those due to the crime;
- e. Traditional criminal law has community support; and
- f. Can be applied effectively.

CONCLUSION

To sum up, Article 44 of the Indonesian Penal Code states that pedophilia is not a mental disorder or developmental issue, hence pedophiles can be held legally accountable. A mental illness called pedophilia involves sexual attraction to youngsters. A pedophile can be held legally responsible. The ramifications for human dignity make pedophilia a delicate moral violation. In Surah Al-Isra 32:32, Allah SWT says, "And do not approach adultery; indeed, it is an indecency and an evil way." Islam bans sexual deviation and its causes. The passage is from Surat al-Israa' 32. Pedophilia has two classifications. Pedophilia can be heterosexual or gay. Heterosexual pedophiles are punished. Islam defines rape as a nonconsensual sexual act by a man against a woman outside of marriage. Since the parties have no legal relationship, it is deemed adultery. Rape deserves a harsh punishment because one party coerced the other. Additionally, homosexual pedophiles should face punishment. History includes the Prophet Lut's time when homosexuality was documented. Scholars universally believe that homosexuality is haram under Islamic law. Their sole disagreement was on the appropriate punishment for wrongdoers. Customary law as regional legislation is explained by von Savigny. Traditional law is part of a society's culture. Customary law is developed by the community, not by a lawmaker. Law is a social standard formed by repeated conduct and purposeful action. Traditional criminal law, based on harmony and communal morality, conflicts with legality.

Bibliography

Books

- Ablisar, Madiasa. (2011). *Hukuman Cambuk Sebagai Alternatif Pemidanaan dalam Rangka Pembaharuan Hukum Pidana Indonesia*. Medan: USU Press
- Al faruk, Asadulloh. (2009). *Hukum Pidana Dalam Sistem Hukum Islam*. Bogor: Ghalia Indonesia
- Atmasasmita, Romli. (1995). *Kapita Selektta Hukum Pidana dan Krimonologi*. Bandung: Mandar Maju
- Chazawi, Adam. (2005). *Percobaan dan Peyertaan bagian 3*. Jakarta: PT. Raja Grafindo
- Hakim, Rahmat. (2000). *Hukum Pidana Islam "Fiqh Jinayah"*. Bandung: CV. Pustaka Setia
- Hayati, E. N. (2000) *Panduan Untuk Pendamping Perempuan Korban Kekerasan Konseling Berwawasan Gender*. Yogyakarta: Rifka Annisa
- Irfan, Nurul dan Masyaeofah. (2003). *Fiqh Jinayah*. Jakarta: Amzah
- Lamintang, P. AF. (1990). *Delik-Delik Khusus Tindak Pidana-Tindak Pidana Melanggar Norma-Norma Kesusilaan dan Norma-norma Keputusan*. Bandung: Mandar Maju
- Munajat, Makhrus. (2004). *Dekonstruksi Hukum Pidana Islam*. Jogjakarta: Logung
- Sadarjoen, Sawitri Supardi. (2005). *Bunga Rampai Kasus Gugatan Psikoseksual*. Bandung: PT. Refika Aditama
- Setiady, Tolib. (2013). *Intisari Hukum Adat Indonesia Dalam Kajian Kepustakaan*. Bandung: Alfabeta
- Sianturi, SR. (1989). *Tindak Pidana di KUHP Berikut Uraianannya*. Cet ke-2. Jakarta: Alumni Ahaem-Petehaem
- Soesilo, R. (1996). *KUHP Serta Komentar-komentarnya Lengkap pasal demi Pasal*. Politea Bogor
- Widnyana, I Made. (1993) *Kapita Selektta Hukum Pidana Adat*. Bandung: PT Eresco

Journal Article

Alodia, Delvina, Jesslyn Lie, and Vini Anggreini. (2019). "Kejahatan Pedofilia Sebagai

- Perilaku Menyimpang Dan Upaya Penegakan Hukumnya." *Jurnal Muara Ilmu Sosial, Humaniora, dan Seni* 2, no. 2
- Audah, Abdul Qadi, *Esiklopedia Hukum Islam IV*, (PT. Kharisma Ilmu) *al-Tasyri' al-Jima'il, al-Islamiy Muqaranah, Bil Qaumil Wadi'*, bab XVIII, bab Zina
- Jaya, Nyoman Serikat Putra. (2016). "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional." *Masalah-Masalah Hukum* 45. No. 2
- Maladi, Yanis. (2010). "Eksistensi Hukum Adat Dalam Konstitusi Negara Pasca Amandemen". *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 22
- Sari, Anak Agung Ayu Sinta Paramita. (2017). "Pertanggungjawaban Pidana Dan Pemidanaan Terhadap Pelaku Pedofilia Dalam Hukum Pidana Indonesia." *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 6, No. 1
- Yudianto, Otto. (2012). *Eksistensi Pidana Penjara Dalam Perspektif Hukum Islam Dan Hukum Adat, Kajian Pembaharuan Hukum Pidana*. Jurnal Ilmu Hukum DIH Vol. 8 No.15. Februari, Universitas 17 Agustus 1945 Surabaya

Internet Resources

- Artikel ini telah tayang di JPNN.com dengan judul "Oknum Guru PNS Ini Ternyata Penjahat Kelamin, Korbannya Sudah Banyak, Ya Ampun", <https://www.jpnn.com/news/oknum-guru-pns-ini-ternyata-penjahat-kelaminkorbannya-sudah-banyak-ya-ampun>
- <https://satunothingimplosible.wordpress.com/2012/03/28/perlindungan-anak/> diakses pada tanggal 10 Juni, 2021, 11:15 WIB
- <https://satunothingimplosible.wordpress.com/2012/03/28/perlindungan-anak/> diakses pada tanggal 10 Juni 2021, 14:10 WIB
- <http://hizbut-tahrir.or.id/2013/02/27/hukum-perkosaan-dalam-islam/> diakses tanggal 9 Juni 2021, Jam 10.55 WIB
- <http://database.co.id/2016/05/hukuman-kebiri.html> diakses tanggal 10 Juni 2021, Jam 14.25 WIB
- <http://unik6.blogspot.co.id/2016/05/kebiri.html> diakses tanggal 9 Juni 2021, Jam 13.23 WIB