

Comparative Study of Death Penalty Against Crimes of Sexual Violence in Children and Its Causes Factor Explore from Differential Association Theory

Sabrina Sheilla Shafira

Universitas Muhammadiyah Magelang
sabinashafira77@gmail.com

Hary Abdul Hakim

Universitas Muhammadiyah Magelang

Augusting Caparanga Camo

University of Saint Anthony Philippines

Basri

Universitas Muhammadiyah Magelang

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ABSTRAK

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Corresponding
Author:
Sabrina Sheilla
Shafira
sabinashafira77@gmail.
com

Kekerasan seksual terhadap anak dianggap sebagai kejahatan yang sangat serius di Indonesia, pemerintah memberlakukan hukuman mati bagi pelaku kejahatan semacam itu. Namun, meskipun penerapan hukuman mati, jumlah kasus kekerasan seksual terhadap anak belum sepenuhnya mengalami penurunan. Oleh karena itu, faktor-faktor yang menyebabkan kekerasan seksual terhadap anak harus dikaji secara mendalam. Penelitian ini bertujuan untuk mengeksplorasi perbandingan penerapan hukuman mati di Indonesia dengan negara-negara yang tidak menerapkannya dalam kasus kekerasan seksual terhadap anak dan untuk menemukan faktor-faktor penyebab kejahatan tersebut dengan menggunakan teori asosiasi diferensial. Metode penelitian yang digunakan adalah penelitian normatif dengan pendekatan undang-undang dan perbandingan. Objek penelitian adalah studi perbandingan mengenai hukuman mati terhadap kekerasan seksual terhadap anak dan faktor-faktor penyebab kekerasan seksual yang dilihat dari teori asosiasi diferensial. Sementara itu, data sekunder diperoleh dari buku, jurnal, dan studi kasus hukum. Analisis data dilakukan dengan menggunakan metode kualitatif deskriptif. Temuan menunjukkan bahwa hukuman mati untuk kekerasan seksual terhadap anak di Indonesia telah diatur dalam Undang-Undang Nomor 1 Tahun 2023 dan pelaksanaannya juga telah dilakukan di beberapa negara seperti India dan China. Namun, ada negara-negara seperti Norwegia, Belanda, dan Kanada yang tidak memberlakukan hukuman mati. Adanya kebutuhan akan kepastian hukum terhadap hukuman mati muncul dari peningkatan tindakan kejahatan seksual yang dilakukan terhadap anak-anak.

Kata Kunci: Kekerasan seksual terhadap anak; hukuman mati; teori asosiasi diferensial.

ABSTRACT

Sexual violence against children is considered a very serious crime in Indonesia, the government imposes the death penalty for perpetrators of such crimes. However, despite the implementation of the death penalty, the number of cases of sexual violence against children has not fully decreased. Therefore, the factors causing sexual violence against children must be studied in depth. **This research aims** to explore the comparison of the application of the death penalty in Indonesia with countries that do not apply it in cases of sexual violence against children and to find the factors causing such crimes using the differential association theory. The **research method** used is normative research with a statute and comparative approach. The object of research is a comparative study of the death penalty for sexual violence against children and the factors causing sexual violence viewed from the differential association theory. While secondary data comes from books, journals, and legal case studies. Data analysis was conducted using descriptive qualitative methods. **The findings** show that the death penalty for sexual violence against children in Indonesia has been regulated in Law Number 1 of 2023 and its implementation has also been carried out in several countries such as India, and China. However, there are countries such as Norway, the Netherlands, and Canada that did not impose the death penalty. The need for legal certainty toward the death penalty emerges from an increase in sexual offenses committed against minors.

Keywords: Sexual violence against; children; death penalties; differential association theory.

INTRODUCTION

Indonesia is currently faced with various cases of sexual violence which experience an increasing percentage, where the victims are not only adults. However, now it has penetrated into teenagers, children, even toddlers are not spared from being the target of sexual predators (Hidayati, 2014). Children are figures who should receive proper protection and treatment, but now children are targets for sexual predators, and these depraved acts are carried out by adults (Handayani, 2022).

Data obtained from the Ministry of Education and Culture regarding the number of sexual violence in 2016-2022 has increased. In 2016 there were 5.584 cases, then in 2017 it increased to 7.538 cases, in 2018 it increased to 8.000 cases, in 2019 cases increased by 8.252, and in 2020 there was an increase with a total of 8,752 cases, in 2021 cases increased again by 9.778, until 2022 cases experienced a surge to 11.686. From all these data, victims of sexual violence are dominated children, which victims are vulnerable to the age of 0-17 years (SIMFONI-PPA, 2022). This is because children are weak or powerless individuals who are vulnerable to sexual harassment.

The reported data continues to increase, while there are still many cases of sexual violence that have not been reported. The reluctance to report is due to factors from the victim who does not willing to report or because the pressure from the perpetrator who threatens the victim. By this facts, the perpetrators of sexual violence against children continue (Abdullah, 2022).

The perpetrators of sexual violence have been identified as friends to family members of the victims. Where, the majority of perpetrators are those who have authority over their victims, such as parents and teachers, who are not immune to violence. However, it should be understood that there are no specific criteria for someone to be said to be a perpetrator of sexual harassment. Anyone can commit sexual violence against minors. Victims are helpless because perpetrators have the power to manipulate them through lies, threats, and physical force (Sihombing et al., 2022)

Article 1 paragraph (15a) of Law Number 23 of 2002, as amended by Law Number 35 of 2014 concerning Child Protection, defines "violence" as "any act against a child which results in physical, psychological, sexual harassment, and/or neglect, including threats to commit acts, coercion, or unlawful deprivation of liberty".

Sexual violence is defined as "any act that embarrasses, abuses, and/or attacks a person's body, and/or reproductive function, due to unequal relations of power and/or gender, which or can cause psychological and/or physical suffering, including those that interfere with one's health." reproduction of a person and loss of opportunity to provide education safely and optimally," according to the UN Convention Against Sexual Violence in Conflict (Kemendikbudristek, 2020).

Sexual violence is included as an act that has a sexual connotation if it fulfills several criteria: the victim experiences coercion of one-sided will by the perpetrator; events are determined by the perpetrator's motivation; the victim did not want the incident to happen; and victims suffer significant losses as a result (Utami, 2016). Every citizen of our country must recognize that sexual abuse of children is a threat to national security on a par with terrorism, corruption and narcotics. For this reason, the government then emphasized regulations related to sexual violence, which carry a penalty of up to the maximum penalty, namely the death penalty.

There are several laws that apply in this case. Article 285 of the Criminal Code specifically discusses rape, while Article 76 D of Law Number 35 of 2014 amends Law Number 23 of 2002 concerning Child Protection prohibiting sexual relations with minors,

Article 81 concerning the affirmation of sanctions in Article 76 D, Article 76 E regarding the prohibition of obscenity against children, and article 82 regarding the affirmation of sanctions given in article 76 E which has been strictly regulated regarding the offense of sexual violence against children.

Even though referring to the Law of the Republic of Indonesia Number 17 of 2016 concerning the Stipulation of Government Regulation in lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection, it emphasizes that when an act of sexual violence is committed, resulting in more than one victim, resulting in serious injuries, mental disorders, infectious diseases, impaired or lost reproductive function, and/or disruption or loss of the victim's own reproductive function.

After the death penalty was implemented, it was not only cases of sexual violence, especially against children, that were destroyed and just reduced even though the maximum sentence had been imposed (Detiknews, 2022). However, the application of death penalty to perpetrators is still being debated until now, because the death penalty given has not been able to reduce the number of sexual violence against children. Therefore, this study aims to determine the factors that cause sexual violence against children, the public's reaction to the imposition of the death penalty for those responsible for sexual violence against children is being studied to inform future policy decisions aimed at protecting children from sexual abuse.

Thus, this research is very important to be conducted, so it can provide useful information for stakeholders, whether it's the government, society, or even the families of child sexual violence victims.

RESEARCH METHOD

This research was conducted using normative research where the research method used contains normative legal elements related to legal systematics, legal synchronization, or legal principles that refer to the law. The research approach methods used were the statute approach and the comparative approach. The object of focus of this research is a comparative study of the death penalty for sexual violence against children and the causes of sexual violence viewed from the theory of differential association. The primary data source was the Law, while secondary data sources were books, journals, and legal case studies. The data collection technique used was literature study. Furthermore, the data obtained by the author will be analyzed using a qualitative descriptive method.

RESULTS & DISCUSSION

A. Death Penalty Against Perpetrators of Sexual Violence Against Children: Comparative Study

Sexual violence against children is a crime that is very cruel and detrimental to the victim (Susila, 2019). Then, every country seeks to provide protection for children and optimal efforts in providing punishment for perpetrators of sexual violence against children. One of the punishments that can be given is the death penalty. The rules in various countries are different. There are several countries that apply the death penalty and there are also several countries that choose not to apply the death penalty for perpetrators of crimes of sexual violence against children. From this, it is necessary to discuss the comparison of the application of the death penalty against perpetrators of crimes of sexual violence against children in Indonesia and other countries.

In Indonesia, regulations regarding the imposition of the death penalty are regulated in the Criminal Code Article 100 of Law Number 1 of 2023 in which, judges can impose death sentences with a probationary period of 10 years by taking into account the defendant's sense of remorse and the hope of improving himself. Thus, the application of the death penalty in Indonesia itself is permissible. Research conducted Bahdar (2019) explains that the law does not yet contain effective sanctions. It is necessary to increase criminal sanctions for perpetrators of sexual violence against children to provide a deterrent effect for perpetrators and also to take concrete steps to restore the physical and psychological condition of victims or perpetrators so that they do not repeat the same thing.

Law Number 23 of 2002 was later amended in Law Number 35 of 2014 concerning Child Protection. The law contains more severe and detailed sanctions rules. In cases of criminal acts of sexual violence against children regulated in Article 82, which initially contained a criminal sanction of a minimum of 3 years and a maximum of 15 years in prison and a maximum fine of Rp. 300.000.000 (three hundred million rupiah) and a minimum of Rp. 60.000.000 (sixty million rupiah), now changed to imprisonment for a minimum of 5 years and a maximum of 15 years and a maximum fine of Rp. 5.000.000.000 (five billion rupiah). And if the perpetrator is a parent, guardian, babysitter, educator, or educational staff, then the penalty is added to 1/3 (one third) of the criminal threat (Mahardika et al., 2020).

However, over time, these regulations have not deterred perpetrators of child sexual abuse. In order to overcome the phenomenon of sexual violence against children in order to provide a deterrent effect on perpetrators and prevent sexual violence against children, the government needs to apply capital punishment and life imprisonment on the basis of the main crime and additional punishment in the form of announcing the identity of the perpetrator. In addition, regulations regarding chemical castration, installation of electronic test kits, and rehabilitation also need to be added. So, the government passed Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection.

The death penalty can be imposed if the act of sexual violence causes more than one victim, results in serious injury, mental disorder, infectious disease, disruption or loss of reproductive function, and or the victim dies, then the perpetrator can be sentenced to death, life imprisonment or imprisonment a minimum of 10 years and a maximum of 20 years (Supaijo, 2016). Apart from Indonesia, there are countries that also apply the death penalty for perpetrators of crimes of sexual violence against children, one of the countries in South Asia, namely India. In April 2018, the Indian Cabinet approved the death penalty for perpetrators of rape and sexual violence against children, besides that the sentence was also increased, from 10 years in prison to 20 years. However, the number of sexual violence in the country is still very high, the number of rape cases in India per 100.000 people is 22.172 people in 2020, while in 2021 India recorded an average of 87 cases of sexual violence that occur to children every day (Silvee, 2020).

Turning to a country in East Asia, namely China, where in fact this country also implements the death penalty for perpetrators of acts of sexual violence against children as stated in the Chinese Criminal Code. The government believes that the death penalty is appropriate and there is no more appropriate punishment for perpetrators of sexual violence than the death penalty. However, even though the death penalty can provide a deterrent effect for perpetrators, in fact there are still many cases of sexual violence that have occurred in China (Diliana, 2023).

Settlement of cases of sexual violence is not solely seen from the awarding or imposition of punishment for perpetrators of sexual violence by giving the maximum penalty or death penalty. Both the government and law enforcers are demanded to look

at cases of sexual violence holistically, moreover the effectiveness of law enforcement will be questioned by the public because they are deemed to have failed to reduce the number of sexual violence.

As for the challenges or obstacles faced by countries that implement the death penalty, whether it is Indonesia or other countries, identifies several challenges, including (Rachmad et al., 2021):

- 1) Human rights concerns: The implementation of the death penalty can be seen as a violation of human rights, such as the right to life and the right to be free from torture or cruel, inhuman, or degrading treatment or punishment.
- 2) Flawed legal systems: The implementation of the death penalty requires a legal system that is fair, impartial, and free from errors, but in many countries, the legal system may be flawed or susceptible to corruption, resulting in wrongful convictions and executions.
- 3) Lack of deterrence: There is little evidence to support the claim that the death penalty deters crime, including crimes such as sexual violence against children. Furthermore, other forms of punishment, such as life imprisonment, may be just as effective in preventing such crimes.
- 4) High costs: Implementing the death penalty can be expensive, as it requires a lengthy and complex legal process, including appeals and extensive legal representation. These costs can be a significant burden on the state's budget.
- 5) International pressure: Many countries and international organizations, such as the United Nations, oppose the death penalty and may apply diplomatic or economic pressure on countries that continue to implement it.

It is important to note that these challenges may differ depending on the country and context in which the death penalty is being implemented.

In addition to the countries mentioned above, there are also countries that do not apply the death penalty for perpetrators of crimes of sexual violence against children. The first example is Norway. Norway has a legal system that emphasizes the rehabilitation and reintegration of sex offenders in society. This country also has a very comprehensive victim treatment program, including treatment, emotional support, and financial assistance (Afiel Paelongan, 2021). Thus, Norway prefers to resolve cases of sexual violence against children with a holistic approach involving

education, social intervention, and improvement of the legal system (Handayani, 2022).

Furthermore, the Dutch State does not apply the death penalty to perpetrators of sexual violence against children because of their philosophical basis and views regarding the death penalty. There are also values that speculate that the death penalty is incompatible with human values and does not provide room for rehabilitation and recovery for the perpetrators. Therefore, instead of providing punishment for perpetrators of crimes of sexual violence against children, the Dutch government focuses more on providing rehabilitation and recovery programs for perpetrators and also helping victims recover from their trauma (Fors, 2020).

From the following explanation, it is important to learn from the legal system implemented in some developed countries that do not apply the death penalty and instead prioritize rehabilitation and recovery for victims. Consistent with this, research conducted by Rachmad (2021) also concludes that there are several compelling reasons why focusing on rehabilitation and recovery for victims may be a more effective solution:

- 1) Firstly, the death penalty does not address the root causes of sexual violence against children. Most perpetrators of sexual violence have themselves experienced trauma or abuse in their own lives, leading to a cycle of violence. Sentencing them to death does not address the underlying psychological, emotional, and social factors that drive their behavior. In contrast, a focus on rehabilitation and recovery for both victims and perpetrators can break this cycle and prevent further harm.
- 2) Secondly, the death penalty does not provide justice or closure for victims and their families. While it may provide a sense of retribution, it does not address the harm that has been done to the victim or the long-term effects of the trauma. Rehabilitation and recovery programs, on the other hand, can help victims heal and rebuild their lives, and can provide a sense of justice by holding perpetrators accountable for their actions.
- 3) Thirdly, the death penalty is a costly and complex process that places a burden on the criminal justice system and the state budget. Rehabilitation and recovery programs, while still requiring resources, are often less costly and can provide

long-term benefits by preventing future crimes and reducing the burden on the justice system.

- 4) Finally, the use of the death penalty for sexual violence against children has been widely criticized for its potential human rights violations and the risk of wrongful convictions. Rehabilitation and recovery programs, in contrast, are consistent with international human rights standards and prioritize the well-being and rights of victims.

In conclusion, while the use of the death penalty may seem like a powerful deterrent to sexual violence against children, the evidence suggests that a focus on rehabilitation and recovery programs is a more effective and just approach. By addressing the root causes of this crime and providing support for victims and perpetrators, we can prevent future harm and promote healing and justice for all.

From the explanations above, the author concludes that on average, countries that do not apply the death penalty for perpetrators of sexual violence against children tend to be more successful in overcoming crimes of sexual violence. This is because law enforcers focus on solving problems as a preventive effort, strengthening the recovery system for victims, focusing on rehabilitation efforts for perpetrators of sexual crimes. This can be useful as an illustration of the efforts of the government and law enforcers in countries that do not provide death penalty for perpetrators. In addition, it can be an example of a more effective solution in dealing with cases of sexual violence against children for the Indonesian state. It is hoped that it can increase public awareness about the importance of overcoming sexual violence against children which does not only focus on the application of the death penalty for the perpetrator.

B. Factors Causing Crime of Sexual Violence Against Children Viewed from the Point of View of Differential Association Theory

Children are weak and vulnerable beings who must be protected from all forms of violence and oppression. They have the right to live free from violence and receive protection from their family, community, and government. Data obtained from the Ministry of Human Rights in 2017-2022 shows that sexual violence is the case that sticks out the most in various social media (SIMFONI-PPA, 2022).

Sexual violence that occurs in both developed and developing countries has similar characteristics, in which case sexual violence arises as a result of sexual

harassment which is carried out first from visual harassment, for example lustful stares, threatening stares of victims, sexual gestures (Chindany & Mansoor, 2020). Apart from that, physical harassment can also be carried out, such as nudging, squeezing, pinching, touching and approaching without being wanted by either party (Lubis, 2018).

Victims of sexual violence are dominated by the age group of 13-17 years based on data obtained from the Ministry of Women's Empowerment for 2017-2022, which age category is still children. As a result, it can trigger psychological disorders such as excessive fear of the opposite sex, depression, and its own trauma, which will have a negative impact, especially when children grow up and mingle in society (Rini, 2020). In addition, sexual violence against children is more common in the household environment. This is in line with research Michele Elliott, Kevin Browne, Jennifer Kilcoyne (1995) that perpetrators of sexual violence against children mostly get access through care and the perpetrators tend to be the closest person to the victim.

Differential Association is a theory put forward by Edwin H Sutherland in 1934 in his first book *Principle of Criminology*. In this theory Sutherland argues that criminal behavior (evil acts) is behavior that is learned in the social environment. This means that all behavior can be learned in various ways. Therefore, the difference between conforming and criminal behavior is based on what and how something is learned (Moh. Dulkihah, 2020). The second version is that criminal behavior or evil deeds are learned. And also, criminal behavior (evil acts) is learned in interaction with other people through a process of regular communication. The emergence of *Differential Association* theory is based on the following:

- a. That everyone will accept and justify the behavior patterns that can be applied.
- b. Failure to follow patterns of behavior can lead to inconsistency and disharmony
- c. Cultural conflict (conflict of culture) is a basic principle in explaining crime

The factors that underlie child violence crimes based on differential association theory are caused by several factors. Firstly, the influence of social status where individuals with low or marginal social status and a lack of positive role models in society tend to commit sexual crimes. High social status does not guarantee that an individual will not commit sexual violence against children, due to the dominant cultural norms that support it. A case in point is the sexual violence crimes committed by Herry Wirawan, the owner and leader of Islamic Boarding

School in Manarul Huda Antapani and Madani Boarding School in Cibiru, Bandung. The perpetrator exploited his position for personal gain, shamelessly turning his female students into sex slaves. Not only that, but he also exploited the infants of his victims to obtain large sums of money from various sources.

The second is the educational factor, the lack of formal education and information related to sexuality and applicable laws, makes individuals less aware of the importance of protecting children from sexual violence that occurs. Not everyone who has a high degree of education and degree is free from evil behavior. There are several factors that cause educated people to commit crimes. The existence of psychological or psychosocial problems that are experienced such as feelings of dissatisfaction with what one has, economic or financial pressure, there are opportunities where the person has access to resources that can make them more likely to commit crimes.

The three factors of culture and norms In Fredman's theory regarding legal culture or legal culture emphasizes the importance of recognizing the role of culture in shaping individual perceptions, attitudes and behavior towards law (Santoso, 2021). A culture that treats children as objects of sexuality and the existence of norms that justify sexual violence against children as a normal thing are things that strengthen the existence of acts of sexual violence. This is what happened in the Herry Wirawan case, because of the culture and norms that justify that the teacher is a role model where the female students judge that what the perpetrator says cannot be rebutted. The perpetrators continued to postulate Islamic teachings that they must obey their teachers.

The four factors are excessive exposure to media and pornography which contains elements of sexual violence, which can trigger acts of sexual violence against children. Moreover, it is supported by the rapid development of technology and there is no filtering of information that spreads. The last factor is that individuals who have experienced sexual trauma in the past have a tendency to do the same for children. Where the perpetrator had been a victim of sexual violence, so for that reason, according to his confession, he committed the crime as a means to treat the trauma that was in him.

Several studies have been conducted by Jon R Conte, Steven Wolf, and also Tim Smith (2018) explains that perpetrators of sexual violence against children have

abilities that they get from social interactions that exist in society. The perpetrator learns the methods and applies them to the victim. , another study from Michele Elliott, Kevin Browne, Jennifer Kilcoyne (1995), perpetrators of sexual violence against children mostly get access through care where this care can be carried out with social interaction. Look after children who are then perpetrators of sexual violence using bribery, violence and threats.

Differential association theory also emphasizes the importance of social interaction in influencing how the individual behaves. Individuals who are firmly bound in strong social relationships with other individuals who have social norms and values that tend to be positive towards children are less likely to commit crimes of sexual violence against children. On the other hand, individuals who are bound in a social environment or social relations that justify sexual violent behavior will tend to have a greater percentage of committing crimes of sexual violence against children (Prafianti et al., 2020).

To address the problem of sexual violence against children, a change is needed, namely a change in attitudes and perceptions in society which can be carried out through intensive educational programs and campaigns regarding the importance of the dangers and consequences caused by criminal acts of sexual violence against children. There is a need for prevention and efforts to reduce the growth rate of cases of sexual violence against children with an assessment of the effectiveness of the law based on public perception.

CONCLUSION

Based on the analysis above, the researcher then concluded that the application of the death penalty in Indonesia has been regulated in Law Number 1 of 2023 and for crimes of sexual violence against children the implementation of the death penalty is specifically regulated in Article 81 Paragraph (5) of Law Number 17 of 2016 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. As with the implementation of the death penalty carried out by South Asian countries such as India and Bangladesh and also in the East Asian region such as China. Although there are several countries in the European region such as Norway, the Netherlands, Canada and others are against the death penalty for perpetrators of sexual violence against children. In addition, the things behind the crime of

sexual violence against children in Indonesia based on the formulation or article of offense associated with the differential association theory of the causes of crimes of sexual violence are roles and social status, education, culture and norms, exposure to media and pornography, and also childhood trauma. and others against the death penalty for perpetrators of crimes of sexual violence against children.

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