

A Comparative Study of Positive Criminal Law and Islamic Criminal Law on Child Protection

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ABSTRACT

This study examines legal protection against the commercial sexual exploitation of children through a comparative analysis of Indonesian criminal law and Islamic criminal law. Using a normative legal research method with a prescriptive approach, the study analyzes legal doctrines, statutory regulations, Islamic legal principles, and relevant literature. The findings reveal that commercial sexual exploitation of children remains influenced by poverty, socio-cultural conditions, political factors, social stigma, and weaknesses in law enforcement. Indonesian criminal law provides protection through a mixed sentencing system emphasizing punishment, prevention, and victim protection, while Islamic criminal law offers a comprehensive framework based on *maqashid al-shari'ah* and *ta'zir* sanctions. The comparative analysis demonstrates that integrating the legal certainty of positive law with the moral and preventive values of Islamic law can strengthen child protection and enhance efforts to prevent and combat commercial sexual exploitation of children. The study proposes a reconstructed legal protection model that is more comprehensive, victim-oriented, and responsive to contemporary challenges.

ARTICLE INFORMATION

Keywords:

Child protection, commercial sexual exploitation of children, criminal law, comparative law.

1. Introduction

Child protection is a fundamental responsibility of families and the state. According to M.G.E. Sumiarni, children possess inherent rights that must be safeguarded to ensure their physical, mental, and social development (Endang & Chandra, 2000; Sumiarni et al., 2022). This protection requires a supportive family environment as well as legal guarantees from the government. Indonesia has demonstrated its commitment to children's rights through various legal instruments, including the ratification of the United Nations Convention on the Rights of the Child through Presidential Decree No. 36 of 1990. Nevertheless, cases of child sexual

exploitation continue to increase, indicating that legal protection has not been fully effective. Weak law enforcement, inadequate implementation of child protection regulations, limited public awareness, and poor coordination among institutions remain significant obstacles in preventing and addressing crimes against children. (Sumiarni et al., 2022)

Several scholars emphasize the importance of adopting a comparative legal approach to strengthen child protection. Hernandez argue that effective legal protection requires stricter sanctions against perpetrators and a fair enforcement system capable of deterring future offenses. Similarly, Barda Nawawi Arief views

comparative law as a method for gaining deeper knowledge of legal systems to improve legal reform, while Zweigert and Kötz define comparative law as the study of comparable legal institutions and solutions across different legal systems. These perspectives suggest that comparing National Criminal Law and Islamic Criminal Law can provide valuable insights for developing a more comprehensive and effective legal framework to combat child sexual exploitation and enhance the protection of children's rights in Indonesia. (Sumiarni, 2024; Tridhonanto, 2014)

2. Literature Review

2.1 The Theory of Legal Protection

The middle-range theory applied in this study is the Theory of Legal Protection, which examines the forms, objectives, and mechanisms of legal protection provided to individuals through the law. In the context of positive criminal law, legal protection encompasses both preventive and repressive measures. Preventive protection seeks to prevent legal violations through effective regulations and supervision, while repressive protection aims to restore victims' rights and ensure justice through the imposition of sanctions on offenders. In addition, the concept of progressive legal protection emphasizes that criminal law should not only punish perpetrators but also prioritize substantive justice and provide meaningful protection for victims. This perspective is further strengthened by the restorative justice approach, which focuses on victim recovery, rehabilitation, and active participation in the legal process to achieve more comprehensive and meaningful justice. (Al-Ghazaliatul, 2019; Nurfadillah et al., 2025)

From the perspective of Islamic Criminal Law, legal protection is closely linked to the objectives of Islamic law, which seek to safeguard fundamental human interests, including life, dignity, lineage, and property. In cases of child sexual

exploitation, the protection of life and lineage constitutes a central legal objective. Islamic criminal law also recognizes flexible sanctions that can be adapted to the severity of the offense and the broader interests of justice, allowing for measures that support victim rehabilitation and social welfare. Furthermore, the concept of social responsibility emphasizes that the protection of children is not solely the responsibility of individuals but also of society and the state. Consequently, effective child protection requires both legal sanctions against offenders and collective efforts to strengthen social institutions and prevent exploitation. (Al-Zuhayli, 2010; Fahrudin Ali Sabri, 2012)

2.2 Theory of Justice

One of the grand theories employed in this study is the Theory of Justice. Justice is generally classified into two main forms: distributive justice and corrective justice. Distributive justice concerns the fair allocation of rights, obligations, and benefits according to proportional considerations, while corrective justice focuses on restoring balance when a legal violation has occurred through appropriate sanctions and remedies. In addition to the theory of justice within positive criminal law, this study also adopts the theory of *Maqasid al-Shariah* as a grand theoretical framework in formulating concepts of criminal liability and evidentiary law concerning child commercial sexual exploitation in Indonesia. (Munir, 2023; Rasyid et al., 2024)

Several justice theories serve as analytical frameworks in this research. First, the concept of distributive and corrective justice provides the foundation for the principle of equality before the law, ensuring that all individuals receive fair treatment within the legal system. Second, the theory of justice based on liberty and equal opportunity emphasizes that legal arrangements should particularly protect disadvantaged and vulnerable groups, including child victims of sexual

exploitation. This perspective supports a victim-oriented approach that prioritizes recovery and protection alongside the punishment of offenders. Third, the theory that integrates legal certainty, justice, and social utility highlights that criminal law should not only provide clear and enforceable rules but also reflect moral values and generate benefits for society. These principles are particularly relevant in addressing child sexual exploitation, where legal protection must balance certainty, fairness, and the broader goal of safeguarding children's rights and welfare. (Miaw, 2023; Waris et al., 2025)

2.3 *Maqāṣid al-Sharī'ah Theory*

Linguistically, *maqashid syariah* consists of two words, namely *maqashid* and *syari'ah*, *maqashid* is interpreted as intentionally or with the intention of (*qashada ilaihi*). According to the Indonesian Dictionary (*Kamus Besar Bahasa Indonesia*), *sharia* refers to the straight path. (RI, 2022)

From the perspective of Islamic Criminal Law, justice is regarded as the fundamental principle for maintaining social order, protecting individual rights, and promoting public welfare. Islamic legal theory emphasizes that injustice is a major cause of social disorder and institutional decline; therefore, the law must be applied fairly and proportionately to preserve social balance. Justice is also closely linked to the objectives of Islamic law (*maqasid al-shariah*), which seek to protect essential human interests and ensure both individual and collective well-being. Accordingly, criminal sanctions are designed not only to punish offenders but also to prevent harm, restore justice, and promote social reform. This approach further recognizes the need to balance the rights of victims and offenders, allowing judges a degree of discretion in determining sanctions that best serve justice, rehabilitation, and the broader public interest. (Ivie & Khaldūn, 1959; Rajafi, 2023; Rosenthal, 2020)

2.4 *The Reality of Child Commercial Sexual Exploitation in Indonesia*

Commercial sexual exploitation of children in Indonesia remains a serious child protection issue with a relatively high prevalence. Data from various institutions indicate that the number of cases has fluctuated over time, although several reporting periods show a declining trend. Nevertheless, these figures do not fully reflect the actual situation, as many cases remain unreported and fall within the category of hidden crimes. In addition, Indonesia continues to face a significant number of online child sexual exploitation cases, placing the country in a concerning position within the global landscape of child sexual abuse and exploitation. Data from the Online Information System for the Protection of Women and Children (Simfoni PPA) further reveal that sexual violence against children constitutes a substantial proportion of reported violence cases nationwide. (Nugraha & Subaidi, 2022; PPPA, 2020)

In terms of geographical distribution, cases of commercial sexual exploitation of children have been identified across most provinces, with the highest concentrations recorded in West Java, East Java, and Central Java. Regions such as Jakarta, Bali, and Central Sulawesi also demonstrate considerable vulnerability due to population density, high social mobility, economic activities, and intensive tourism flows. Although Indonesia has established a relatively strong legal framework through the Child Protection Law and the Law on Sexual Violence Crimes, its implementation continues to face significant challenges, particularly in inter-agency coordination and the effectiveness of law enforcement. These findings suggest that child protection efforts require not only stronger legal regulations but also improvements in reporting mechanisms, early detection systems, law

enforcement practices, and institutional collaboration to prevent and address the commercial sexual exploitation of children more effectively. (Arief et al., 2016; Padjrin, 2016)

2.5 The Reality of Child Sexual Exploitation in Selected Muslim-Majority Countries

The concept of *jarimah* in Islamic Criminal Law is not merely concerned with imposing sanctions on offenders but also aims to promote justice, protect human dignity, and ensure social welfare. Through the principles of *maqāṣid al-sharī'ah*, Islamic law places the protection of life, honor, and lineage among its primary objectives, which should be safeguarded by both the state and society. However, the findings of this study reveal a gap between these normative principles and the realities observed in several Muslim-majority countries. Evidence from various studies indicates that child sexual exploitation remains a serious concern, taking diverse forms such as sexual abuse, online exploitation, bacha bazi practices, and child trafficking. This situation demonstrates that the existence of legal norms and religious teachings does not necessarily guarantee the effective protection of children in social practice and law enforcement. (Ibrahim et al., 2025; Shapiro, 2014)

A comparative analysis of several Muslim-majority countries shows that the prevalence of child sexual exploitation is influenced by different social, economic, cultural, and political factors. Afghanistan and Yemen face challenges related to armed conflict, patriarchal traditions, and weak legal systems, while Pakistan and Egypt continue to struggle with poverty, social stigma, and low reporting rates. Iran reports relatively lower prevalence rates; however, limited data availability and underreporting suggest that the actual situation may be more severe than officially recorded. Indonesia, meanwhile, faces challenges associated with digital sexual exploitation,

inadequate parental supervision, and socioeconomic pressures. Nevertheless, legal reforms through the Sexual Violence Crime Law have contributed to greater legal awareness and improved access to protection for victims. These findings indicate that effective child protection depends not only on the existence of legal regulations but also on the quality of law enforcement, societal conditions, and the state's commitment to safeguarding children's rights comprehensively. (Karimullah, 2023)

The high number of CSEC cases in Jakarta, Bali, and Central Sulawesi demonstrates that this issue cannot be understood solely as a moral or individual behavioral issue, but rather as a consequence of the interaction of various social, economic, political, and institutional factors that create systemic vulnerability for children. Therefore, efforts to address it cannot be achieved solely through social prevention and community economic empowerment approaches; they also require an effective and integrated law enforcement system. In this context, Indonesia already has a fairly strong legal basis through Law Number 35 of 2014 concerning Child Protection, Law Number 21 of 2007 concerning the Eradication of the Crime of Human Trafficking (TPPO), the Electronic Information and Transactions Law (ITE), and provisions in the Criminal Code that regulate various forms of sexual exploitation of children. However, these regulations have not been able to fully reduce the number of CSEC cases due to various obstacles in their implementation. (Kamali, 2015; Shapiro, 2014)

These obstacles include weak coordination between law enforcement agencies, resulting in fragmented case handling; limited capacity of officers to conduct digital forensics and handle child victims; and low reporting rates due to social stigma that still considers sexual violence cases a family disgrace. Furthermore, local

economic interests and weak oversight of sectors vulnerable to exploitation by exploitation networks, particularly in tourist destinations, also complicate comprehensive case resolution. These challenges are further complicated when crimes are committed through digital platforms or involve cross-regional and cross-national networks. Therefore, it is necessary to strengthen the capacity of special CSEC investigation units, develop an integrated national data system, improve the competence of law enforcement officers in handling cybercrime and child victims, and strengthen regulations that require tourism businesses to participate in child protection efforts. Without institutional improvements, adequate funding, and effective coordination between agencies, CSEC prevention efforts will struggle to achieve optimal results, even if the existing legal framework is relatively comprehensive. (Karimullah, 2023; Luthfi et al., 2024)

3. Methodology

This study employed a normative legal research method with a prescriptive approach. The research focused on examining legal norms, doctrines, principles, and concepts related to the legal protection of children against commercial sexual exploitation. (Sugiyono, 2017; Syahrizal & Jailani, 2023) Data were collected through a literature review of primary legal materials, including statutory regulations, the Qur'an, and Hadith, as well as secondary and tertiary legal sources such as books, journal articles, and other relevant scholarly works. A comparative legal approach was applied to analyze and compare the concepts of criminal liability, evidentiary standards, and sanction systems in Indonesian criminal law and Islamic criminal law. The collected data were analyzed qualitatively to formulate a conceptual reconstruction of a more comprehensive legal protection framework for child victims of commercial sexual exploitation.

4. Results and Discussion

4.1 The Reality of Commercial Sexual Exploitation of Children in Indonesia and Muslim-Majority Countries

The study reveals that the commercial sexual exploitation of children remains a serious issue in both Indonesia and many Muslim-majority countries. The prevalence of this crime varies across jurisdictions due to differences in social, economic, cultural, political, and legal conditions. Factors such as poverty, limited access to education, social stigma, and inadequate child protection mechanisms have been identified as the primary contributors to children's vulnerability to sexual exploitation.

The findings further indicate that advances in information technology and digital media have expanded the forms and methods of child sexual exploitation. Although several countries have enacted specific legal frameworks to protect children, ineffective implementation and weak law enforcement continue to hinder prevention efforts. Therefore, strengthening legal protection requires not only punitive measures against offenders but also comprehensive strategies focusing on prevention, rehabilitation, and long-term victim support.

4.2 Sentencing System under Indonesian Positive Criminal Law

The study finds that Indonesia adopts a mixed sentencing model that combines retributive, preventive, and rehabilitative approaches. In addressing commercial sexual exploitation of children, legal protection is provided through various statutory instruments, particularly the Child Protection Law and the Law on Sexual Violence Crimes. These regulations allow for enhanced penalties against offenders in order to create a deterrent effect and strengthen the protection of children as a vulnerable group.

In addition to imprisonment and fines, Indonesian law recognizes supplementary sanctions such as chemical castration, public disclosure of offenders' identities, and confiscation of criminal proceeds. This approach demonstrates that the objectives of punishment extend beyond retribution, encompassing victim recovery, protection of children's dignity, and prevention of future offenses through a legal framework centered on the best interests of the child.

4.3 Sentencing System under Islamic Criminal Law

The study demonstrates that Islamic Criminal Law provides a comprehensive and balanced sentencing system that integrates deterrence, just retribution, and social restoration. This framework is implemented through the mechanisms of *hudud*, *qisas/diyat*, and *ta'zir*. Within this perspective, the commercial sexual exploitation of children is regarded as a grave offense that threatens the dignity, safety, and future of children, thereby requiring firm legal intervention.

Since commercial sexual exploitation of children is not specifically categorized under *hudud* offenses, the concept of *ta'zir* serves as the most appropriate legal mechanism. Under *ta'zir*, judges are granted discretionary authority to impose sanctions proportional to the severity of the offense, the offender's intent, and the harm inflicted upon the victim. This approach is consistent with the objectives of *maqashid al-shari'ah*, particularly the protection of life (*hifz al-nafs*), dignity (*hifz al-'ird*), and lineage (*hifz al-nasl*), thereby providing a strong normative foundation for child protection.

4.4 Comparative Findings and Reconstruction of the Legal Protection

The comparative analysis reveals that both Indonesian positive criminal law and Islamic Criminal Law share the common

objective of protecting children, although they employ different approaches. Positive law emphasizes legal certainty through detailed statutory regulations and formal enforcement mechanisms, whereas Islamic Criminal Law prioritizes moral values, public welfare (*maslahah*), and the protection of human dignity based on the principles of *maqashid al-shari'ah*. As a result, both legal systems possess complementary strengths in addressing the commercial sexual exploitation of children.

The study proposes a reconstructed legal protection model that integrates the legal certainty offered by positive law with the moral and preventive values embodied in Islamic Criminal Law. Such integration is expected to establish a more comprehensive child protection framework that ensures effective punishment of offenders, stronger preventive measures, and greater attention to victim recovery. Consequently, the commercial sexual exploitation of children should be addressed as a serious crime requiring a holistic, victim-oriented, and sustainable legal response.

5. Conclusion

This study concludes that the commercial sexual exploitation of children constitutes a serious violation of children's rights that requires comprehensive legal protection. Indonesian positive criminal law provides protection through a combination of punitive, preventive, and rehabilitative measures, while Islamic Criminal Law offers a value-based framework grounded in **maqashid al-shari'ah** and **ta'zir** sanctions. The comparative analysis demonstrates that integrating the legal certainty of positive law with the moral and preventive principles of Islamic law can strengthen child protection, enhance deterrence, and promote a more effective and victim-oriented legal response to the commercial sexual exploitation of children.

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